

1 STATE OF MINNESOTA DISTRICT COURT

2 COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

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4 The State of Minnesota,

5 by Hubert H. Humphrey, III,

6 its attorney general,

7 and

8 Blue Cross and Blue Shield

9 of Minnesota,

10 Plaintiffs,

11 vs. File No. C1-94-8565

12 Philip Morris Incorporated, R.J.

13 Reynolds Tobacco Company, Brown

14 & Williamson Tobacco Corporation,

15 B.A.T. Industries P.L.C., Lorillard

16 Tobacco Company, The American

17 Tobacco Company, Liggett Group, Inc.,

18 The Council for Tobacco Research-U.S.A.,

19 Inc., and The Tobacco Institute, Inc.,

20 Defendants.

21 - - - - -

22 DEPOSITION OF EARL E. KOHNHORST

23 Volume III, Pages 555 - 811

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1           (The following is the continued deposition  
2 of EARL E. KOHNHORST, taken pursuant to Notice of  
3 Taking Deposition, at the offices of Dorsey &  
4 Whitney, Attorneys at Law, 16th Floor, 250 Park  
5 Avenue, New York, New York, commencing at  
6 approximately 8:37 o'clock a.m., June 18, 1997.)

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## 1 I N D E X

2	EXHIBITS	DESCRIPTION	PAGE MARKED
3	Plf's	324 Memo dated February 17,	
4		1986, Gordon to Kohnhorst,	
5		Bates 682003345-60	578
6		325 "THE FUNCTIONAL SIGNIFICANCE OF	
7		SMOKING IN EVERYDAY LIFE,	
8		REPORT NO. RD.1962 RESTRICTED,	
9		24th April, 1984," Bates	
10		105538876-9175	654
11		326 B&W's Responses to Plaintiffs'	
12		First Request for Admissions	691
13		327 "CLAIMS THAT CIGARETTES ARE	
14		ADDICITIVE CONTRADICT COMMON	
15		SENSE," Bates MNAT00639587	693
16		328 "PAPER 7: COLIN GREIG," Bates	
17		100503495-506	700
18		329 "RECEPTORS FOR NICOTINE IN	
19		THE CENTRAL NERVOUS SYSTEM: I	
20		RADIOLIGAND BINDING STUDIES,	
21		REPORT NO. RD.1960 RESTRICTED,	
22		22nd March 1984", Bates	
23		105572065-100	735
24			
25			

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1                   330 "EFFECTS OF LIGHT AMMONIA  
2                   TREATMENT ON CIGARETTE SMOKE  
3                   PROPERTIES," February 3, 1977,  
4                   Bates 400582710-25                   743  
5                   331 Research Conference document,  
6                   Bates 107463454-530                   748  
7                   332 Memo dated 7.8.64, Anderson  
8                   to Dobson, Bates 100059066-7   757  
9                   333 Handwritten notes with  
10                  attachment, Bates  
11                  510004196-203                   765  
12                  334 Letter dated December 4, 1984,  
13                  Johnson to Matkin, Bates  
14                  512104912-3                   778  
15                  335 File note dated September 23,  
16                  1985 by Denier, Bates  
17                  620388455-8                   786  
18  
19  
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1 P R O C E E D I N G S

2 (Witness previously sworn.)

3 MS. WIVELL: Thank you. Before we begin  
4 the questioning today, there are some issues that I'd  
5 like to put on the record concerning some of the  
6 things that have occurred here, and upcoming  
7 depositions.

8 First of all, we have a deposition scheduled  
9 next week for Dr. Griffith -- I'm sorry, not Dr.  
10 Griffith -- Mr. Pritchard, and Mr. Pritchard used to  
11 be the president of B&W and was a B.A.T. director, if  
12 I recall correctly. This deposition has been noticed  
13 for months. We received for the --

14 By the way, this deposition was noticed after  
15 Brown & Williamson agreed to produce Mr. Pritchard,  
16 and we did not subpoena him. As a result of that, we  
17 have not undertaken the subpoena process.

18 Approximately two weeks ago I received a letter  
19 from, I believe it was, Mr. McCormick, saying that  
20 Mr. Pritchard had some undefined medical problem and  
21 that the deposition was questionable, or something to  
22 that effect -- and I apologize, I don't have that  
23 statement -- but that he would report. I have not  
24 heard any further reports, but I'm tremendously  
25 concerned because yesterday I asked defense counsel

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1 here for a report on that -- on whether that  
2 deposition was going forward because I have  
3 requirements for predesignation pursuant to the  
4 court's order which I must meet this week. I am also  
5 concerned because when I returned to my hotel last  
6 night I learned that I had received a message from  
7 Mr. Stirewalt's office to the effect that -- this is  
8 third-hand -- that they understood the deposition had  
9 been postponed and they wanted to reschedule it.

10 That deposition is on, and it is a  
11 properly-noticed deposition. We have not received  
12 any evidence other than an unsupported letter from  
13 counsel that Mr. Pritchard -- I'm -- is ill. I would  
14 also like to point out for the record that the  
15 counsel that represented that to me I believe is the  
16 same one who represented that Mr. Kohnhorst was no  
17 longer employed by B&W in our discussions back in  
18 March, and I come to find at this deposition that Mr.  
19 Kohnhorst is still being paid by Brown & Williamson  
20 and is a Brown & Williamson employee, although he is  
21 currently working in -- for another organization on  
22 Brown & Williamson's behalf. At least that's what I  
23 understand his testimony to be. And I'm not taking  
24 any exception with Mr. Kohnhorst, I'm just saying  
25 that I am tremendously concerned that representations

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1 have been made by counsel who -- based on those  
2 representations back in March, we did not subpoena  
3 this witness.

4       If this deposition doesn't go forward, if it's  
5 Brown & Williamson's position this deposition is not  
6 to go forward, then I think that that is the position  
7 they have to raise with the court and seek a motion  
8 for protection, or at least provide us with evidence  
9 that Mr. Pritchard is indeed ill. I say this because  
10 yesterday Ms. Fox informed me that the next  
11 deposition which we had scheduled for Dr. Sanford,  
12 again another person whom we did not subpoena, needed  
13 to be rescheduled because of the unavailability of  
14 counsel.

15       There is an order in this litigation that all  
16 depositions will go forward as scheduled and that the  
17 unavailability of counsel will not be an excuse for  
18 the rescheduling of a deposition. We plan and intend  
19 to take Dr. Sanford's deposition. We are on a very  
20 tight deposition schedule here in this litigation.  
21 We are facing discovery cut-offs coming up. We are  
22 trying to schedule 32.0(f) depositions, as we  
23 reported to the court, and we do not have time to  
24 reschedule depositions, especially depositions that  
25 have been set since March. So I'm very concerned

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1 about that.

2       It seems that we have some kind of a pattern  
3 emerging here. And the plaintiffs intend to go  
4 forward with this, and I'm putting Brown & Williamson  
5 on notice right now that if there's going to be any  
6 change in these depositions, that they had better  
7 seek an order of protection from the court or an  
8 order -- or at least allow us to know what in the  
9 world's going on. Because all I received was simply  
10 a one- or two-paragraph letter concerning Mr.  
11 Pritchard's deposition, and I've heard from other  
12 people who have attended this deposition that they  
13 heard that the Pritchard deposition is off.

14       For the record, the Pritchard deposition is on.  
15 That's the first point.

16       The second point has to do with deposition  
17 exhibits. Yesterday I noticed Ms. Fox asked counsel  
18 for Philip Morris, who's -- who have kindly offered  
19 to provide us space here at this office, to make  
20 three copies of certain exhibits, and I infer from  
21 that that she intends to use these exhibits at her --  
22 during her direct examination of this witness. Last  
23 night, after we went off the record, I asked Ms. Fox  
24 for copies of all exhibits she intended to use, and I  
25 pointed out that by court order all exhibits she

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1 intended to use at this deposition were to be  
2 designated three days before the deposition. She  
3 said she was unaware of such a court order. There is  
4 such a court order. It was entered by this court in  
5 March of this year.

6 I have received no predesignation. My office  
7 has received no predesignation. I have received one  
8 document in response to a prior inquiry while we were  
9 on the record, and I am going to object to the use of  
10 any exhibits by Ms. Fox in this deposition because  
11 none were designated. It is a matter that I will  
12 address with the court during the deposition if I  
13 have to.

14 The final matter has to do with a document that  
15 Ms. Fox did provide to me. It is Bates number  
16 682003345. She gave it to me last night when I was  
17 trying to talk to Mr. Kohnhorst about a meeting that  
18 occurred on February 17th, 1986 that was attended by  
19 Mr. Kohnhorst, Mr. Wells, Mr. Esterle and Mr.  
20 Gordon. That document was originally produced to the  
21 plaintiffs by Philip Morris -- I'm sorry. The  
22 document -- I'm sorry. Let me start again.

23 A document written by Mr. Wells concerning that  
24 meeting which has been on the Internet and which I  
25 have read on the Internet was also produced to us by

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1 Philip Morris. That document I listed on a  
2 predesignation list for a Brown & Williamson 30.02(f)  
3 deposition. At the time I listed that document we  
4 received notification from the defendants that the  
5 document as produced by Brown & Williamson -- by  
6 Philip Morris that bore the Bates number -- I'm  
7 sorry, I don't have the Bates number -- but bore a  
8 Bates number also from Brown & Williamson that began,  
9 I believe, 68. They asserted privilege for and asked  
10 us to return all copies of it. So I attempted to ask  
11 questions about that meeting of Mr. Kohnhorst only to  
12 learn from Ms. Fox that he had seen another document  
13 Bates numbered 682003345, and she gave me that  
14 document.

15 I have checked, and to the best of my knowledge,  
16 document Bates number 682003345 was never produced to  
17 the plaintiffs in the Minnesota depository.  
18 According to our computer records -- and of course I  
19 wasn't able to this morning confirm that with the  
20 depository because it wasn't open. I have found a  
21 document on the 4B -- I've been doing this by  
22 computer over -- via modem, so I can't see the actual  
23 document -- that bears the same date, but there's no  
24 way for me to confirm that this document which she  
25 provided me, Bates number 682003345, is the same

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1 document that was produced to the depository in  
2 Minnesota. There is simply no way for me to  
3 determine that. It does appear to be a memo  
4 concerning the same meeting that is the subject of  
5 the document that Brown & Williamson and Philip  
6 Morris asserted privilege for which was produced to  
7 the plaintiffs by Philip Morris.

8       If this document, Bates number 682003345, et  
9 seq, is about the same meeting of the -- that  
10 occurred that is memorialized in the Wells memorandum  
11 that has been produced to plaintiffs and was then  
12 returned to the defendants under the claim of  
13 inadvertent production, we believe that privilege  
14 claims with regard to anything said at that meeting  
15 or any memos concerning that meeting have been waived  
16 in light of the fact that we have now for the first  
17 time last night received document 682003345. And we  
18 will make that presentation to the special master and  
19 to the court.

20       We believe that this matter -- that we are  
21 prevented by claims of privilege from examining Mr.  
22 Kohnhorst about all of the facts which occurred at  
23 that meeting, and as a result of the claims of  
24 privilege which have been asserted by Brown &  
25 Williamson and Philip Morris, we are going to keep

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1 the record open and, if necessary, ask that Mr.  
2 Kohnhorst return so that we can take testimony about  
3 the document should the court find that there has  
4 either been waiver, or, in the alternative, that the  
5 document is not privileged or work product. I want  
6 to make that record.

7 I think it is unconscionable that we are  
8 receiving for the first time during the deposition,  
9 at the end of the second day of the deposition, a  
10 document that was not, to the best of my ability, I  
11 can say, produced in the Minnesota depository. Like  
12 I said, I can't tell if it's similar to another  
13 document that was, I just don't know, but I -- I do  
14 take exception to this. As I said, if -- I'm sorry,  
15 strike that.

16 I think that this problem could have been solved  
17 while we were back in Minneapolis had the document  
18 been predesignated. And in fact when we  
19 predesignated the one for which privilege has been  
20 asserted back in March or April when we did our  
21 predesignation, privilege was asserted and we were  
22 able -- and the document was not used at the  
23 deposition. So there have been multiple depositions  
24 where we intended to use the document for which  
25 privilege was asserted but which we were unable to

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1 use the document at. All right.

2 MS. FOX: I'd like to respond, please.

3 Taking them in order, yesterday I requested  
4 counsel, as a professional courtesy, to consider  
5 changing the date of Mr. Sanford's deposition because  
6 of a trial conflict of the attorney who was  
7 responsible for defending Mr. Sanford at that  
8 deposition. Rather than addressing whether she would  
9 do that as a professional courtesy, Ms. Wivell has  
10 taken the opportunity to suggest that we were  
11 insisting on that deposition changing. I had asked  
12 her to do so as a professional courtesy, and I would  
13 have expected that she would have conferred with me.

14 With respect to Mr. Kohnhorst, I am not aware of  
15 the characterization that Ms. Wivell puts on it in  
16 terms of whether or not Mr. Kohnhorst was a B&W  
17 employee. He is presently with B.A.T. (Holdings) in  
18 the U.K., and at any rate, he has appeared for  
19 deposition here in Minne -- here in New York and  
20 traveled from overseas to appear for that  
21 deposition. Hasn't raised and there haven't been any  
22 issues with respect to the scheduling of his  
23 deposition.

24 With respect to Mr. Pritchard, Mr. Pritchard has  
25 had some recent health difficulties, he is undergoing

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1 diagnostic tests, and as soon as I have information  
2 to report to Ms. Wivell and the court I will to do  
3 so, and I am looking into that issue and we can  
4 address that further. That's issue number one.

5       With respect to the issues on predesignating  
6 exhibits, I have taken a look now at the court's  
7 order that is dated 3-20 1996, at paragraph 14, which  
8 concerns predesignation of deposition exhibits, and  
9 the provisions in this paragraph refer to the  
10 obligations of the noticing party, that would be Ms.  
11 Wivell. I have also taken a look at a second order  
12 that the court has issued, which is dated March 13th,  
13 1997, which concerns the predesignation of  
14 deposition -- which concerns exhibits and references  
15 the predesignations of exhibits, again referencing  
16 the noticing party's obligation, and adding that, in  
17 addition, if there are documents that the defendant  
18 attorney is going to be using that are not among the  
19 documents previously copied by opposing counsel from  
20 the Minnesota select materials, then the counsel will  
21 provide that copy of that particular document, but  
22 the predesignation obligations do not apply to the  
23 non-noticing party.

24       In any case, I will represent to Ms. Wivell that  
25 in addition to the one document that I gave her last

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1 night and one more document which we'll have copied  
2 for her, which I believe is in the depository, but  
3 I'm not certain whether she has selected it from the  
4 depository, I will have a copy of that document  
5 made. But I think the reason for these obligations  
6 not applying to direct exam -- redirect examination  
7 is one cannot know the scope of the redirect  
8 examination until one has had the deposition take  
9 place.

10 I did have some materials copied. The materials  
11 that I had copied, other than the one document that I  
12 provided to Ms. Wivell, are all materials that were  
13 on Ms. Wivell's predesignation list of exhibits that  
14 she intended to use at this deposition. I note  
15 for -- or were materials that were included in other  
16 materials she intended to use for this deposition. I  
17 note at this moment in time, however, that of the  
18 materials that Ms. Wivell predesignated, of the  
19 materials that she had used in this deposition over  
20 the course of two days, she's only used 19 out of  
21 44 -- 19 out of 44 -- strike that --

22 Nineteen out of 44 of the documents that she has  
23 used at this deposition with Mr. Kohnhorst have been  
24 documents that she has not predesignated. She has  
25 asserted that she is using these documents for

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1 impeachment purposes but has not established the  
2 foundation for impeachment, has not established any  
3 prior inconsistent statement by this witness with  
4 respect to documents that he has previously  
5 authored. And I think, as I've noted repeatedly in  
6 the course of this deposition, that there is an  
7 improper use of impeachment, to impeach a witness  
8 with a document that she hasn't even established his  
9 foundation for the document let alone that it's a  
10 prior inconsistent statement with respect to this  
11 witness. In addition, while she has purported to be  
12 using these materials for impeaching purposes, she  
13 has repeatedly referred back to a document that she  
14 has asserted she put in as exhibits for impeachment  
15 purposes and referred to other sections of those  
16 particular documents at other times during the  
17 deposition, in no way using them in an impeaching  
18 manner. So it's clear to me that what she has in  
19 fact done is gone through a series of documents that  
20 she has not included on her predesignation list. The  
21 problem was evident when we viewed one of those  
22 documents that she had not predesignated was in fact  
23 a privileged document, and we had to take time off  
24 the record to make that determination. That could  
25 obviously have been resolved before the deposition

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1 even began had the document appeared, as it properly  
2 should have, on the predesignated list of exhibits.

3 MS. WIVELL: I would like --

4 MS. FOX: I'm not done.

5 MS. WIVELL: I'm sorry. I beg your  
6 pardon.

7 MS. FOX: I would like to respond to each  
8 of your points.

9 With respect to the document that I provided to  
10 Ms. Wivell before yesterday -- that I provided to Ms.  
11 Wivell yesterday, let me start by saying she has yet  
12 to question the witness on the document, and whether  
13 it concerns the same meeting that she asserts it  
14 concerns, and I suggest that she do that before she  
15 issue conclusions based on that, in any case, it is  
16 my understanding that this document should have been  
17 produced. If it wasn't, it was inadvertent. I don't  
18 believe this is a privileged document because it does  
19 concern a different meeting, but -- and Ms. Wivell  
20 can determine that by questioning at this  
21 deposition.

22 MS. WIVELL: All right. For the record,  
23 Ms. Fox I believe referred to a March 13th, 1997  
24 order and did not refer to it accurately. The order  
25 says, and I quote, concerning prior designation of

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1 deposition exhibits, quote, "Any documents used in  
2 the examination by the defending attorney shall be  
3 predesignated in accordance with prior orders of this  
4 Court, with the exception that the time period for  
5 such designation shall be three days before the  
6 designation." Further in the order -- that's at page  
7 four, paragraph F.2. Further in the order it says,  
8 at page five, G.2., "In addition, copies of any  
9 documents to be used in the examination by the  
10 defending attorney shall be provided to opposing  
11 counsel at least one day prior to the deposition,  
12 even if produced by a party in this litigation, to  
13 the extent that opposing counsel have not previously  
14 copied the document."

15 I have received no copies from Ms. Fox prior to  
16 the deposition. It doesn't say that she has to give  
17 me only things which I haven't copied, it says any  
18 deposition document she intends to use shall be  
19 provided. And I haven't received any nor did I  
20 receive a predesignation.

21 Finally, with regard to assertions about  
22 impeachment -- before I leave that, I just want to  
23 record for the record the fact that it's the  
24 defendants and not the plaintiffs who insisted on  
25 predesignation of deposition exhibits in this case.

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1 And I also want to note for the record that contrary  
2 to the court's order in the Mel Reynolds deposition,  
3 I was not provided with any predesignation, nor did I  
4 receive any documents, and yet during the direct  
5 examination of Mr. McCormick, the same person who  
6 made the representations to me about Mr. Kohnhorst,  
7 he used a document that he had not predesignated. I  
8 objected. He had used it anyway, completely  
9 disregarding the court's order. So there seems to be  
10 a pattern emerging here.

11 The second thing concerns impeachment. There's  
12 a special order regarding impeachment, and after I  
13 read that order I did some research about  
14 impeachment, especially after I heard assertions like  
15 that made by Ms. Fox here today. I researched  
16 Minnesota law and comparable federal law on  
17 impeachment under the comparable federal rule.

18 Defendants seem to take the limited assertion  
19 that impeachment can only be by a witness's own  
20 words, and that is not what my understanding is of,  
21 either, the authorities of cases who have written  
22 about impeachment under Minnesota law and the  
23 comparable Federal Rules. It is my understanding  
24 that a witness may be impeached by his own statement,  
25 by the statement of another under control, by

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1 extrinsic evidence, and can be impeached in a number  
2 and a variety of different ways, and the documents I  
3 have used in this deposition that I have not  
4 predesignated were, to the best of my knowledge, all  
5 used for impeachment, impeaching statements the  
6 witness has either made or claims he doesn't know or  
7 doesn't remember, which he should know, which I also  
8 understand to be a proper basis for impeachment.

9 I have been accused of flagrantly violating a  
10 court's order. I did not flagrantly violate a  
11 court's order. And you didn't say that this morning,  
12 but you have said it later on. I took great -- or  
13 earlier on. I took great pains to make sure I did  
14 not flagrantly violate a court's order. I don't use  
15 those kinds of words very often, and I apologize if I  
16 have used them here this morning. But I am  
17 tremendously concerned because even this morning, Ms.  
18 Fox, when you quoted the court's order or when you  
19 purported to refer to it, you didn't refer to the  
20 section which requires predesignation. And I want to  
21 make this record. I have tried to the best of my  
22 ability to follow the court's order and I expect  
23 defense counsel to do the same.

24 MS. FOX: If I may respond briefly, then we  
25 can move on. I don't believe that you have

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1 established the foundation for many of the documents  
2 that you have used to assertedly impeach this  
3 witness. I don't believe that you have established  
4 the witness's recognition of any of those documents.  
5 In any case, we can proceed with the deposition.

6 With respect to this order, I would like the  
7 opportunity at the break, now that you have pointed  
8 out that section to me, Ms. Wivell, to review it.  
9 And if I have mistakenly misread the court's order in  
10 this particular case, I apologize for that. Trust  
11 me, it -- it is a mistake if I have done so. But in  
12 any case, most of the documents that I intend to use  
13 with this witness, if any documents at all, are  
14 documents that you have predesignated yourself, with  
15 the exception of -- of two documents.

16 Again, I do apologize if I misread the court's  
17 order. It was not my intent to do so. I was  
18 referring -- I was reading one order and I was  
19 referring to another section of the order. And I  
20 would like the opportunity to review the portions  
21 that you have pointed me to.

22 MS. WIVELL: Certainly. And -- and I  
23 extend that courtesy to you. All I'm asking is that  
24 if you're going to use any documents, the first time  
25 I see them not be when you're handing them to the

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1 witness simultaneously.

2 I accept your characterization. And I just  
3 would like -- if you're planning on using any, I  
4 would appreciate receiving them this morning.

5 MS. FOX: Well are -- are we referring now  
6 to --

7 Just so we're clear, because there are a number  
8 of documents which you have predesignated, which I  
9 assume you have reviewed the materials that you have  
10 predesignated.

11 MS. WIVELL: Well, I would like to know  
12 which ones --

13 I have predesignated a lot of exhibits, and this  
14 court says if you're going to use any of them you  
15 have to tell me. At least that's the way I interpret  
16 it. So I just need to know --

17 If you want to give me the Bates numbers, that  
18 way I can look up the document. And if they're  
19 documents I haven't copied -- I just -- there may be  
20 some which I have back at the hotel and I need copies  
21 of. So I think we can work this out off the record.  
22 Okay?

23 MS. FOX: I -- I think we can work this out  
24 off the record as well. But what I will endeavor to  
25 do at the break is review this order, and I will

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1 endeavor to provide you with a list of the Bates  
2 numbers.

3 MS. WIVELL: Fair enough.

4 MS. FOX: And again, I was reading portions  
5 of the court's order, and I will review the -- this  
6 other portion that you have pointed to. I do, on the  
7 impeachment, disagree with you. We can proceed.  
8 I -- I don't think it's been proper impeachment, but  
9 we can proceed.

10 MS. WIVELL: All right. Can we go off the  
11 record for just a minute?

12 THE REPORTER: Off the record, please.

13 (Recess taken.)

14 (Plaintiffs' Exhibit 324 was marked  
15 for identification.)

16 EARL E. KOHNHORST  
17 called as a witness, being previously  
18 sworn, was examined and testified as  
19 follows:

20 ADVERSE EXAMINATION (cont'd)

21 BY MS. WIVELL:

22 Q. Good morning, Mr. Kohnhorst.

23 A. Good morning.

24 Q. You understand you're still under oath?

25 A. I do.

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1 Q. All right. You were present this morning for  
2 some discussions that took place on the record before  
3 we actually started to talk to you; right?

4 A. Yes.

5 Q. Okay. And you heard those; right?

6 A. Yes, I did.

7 Q. All right. Now some of those discussions  
8 concerned a document we now have marked as Exhibit  
9 324; correct?

10 A. Yes.

11 Q. Now is Exhibit 324 a document that you received  
12 in the ordinary course of business during your --  
13 during the time that you were vice-president of  
14 research, development and engineering?

15 A. Yes, it would have been.

16 Q. It's a Brown & Williamson business record.

17 A. Yes, I believe it is.

18 Q. All right. Concerns a meeting that you had with  
19 Mr. Wells, Mr. Esterle and Mr. Gordon on February  
20 17th, 1986?

21 A. I've -- I'm not sure who the meeting was with.  
22 The -- the document does show these names. It's  
23 addressed to me and it shows a -- a copy to Mr. J. K.  
24 Wells and Dr. J. E. Esterle, and it's from Gordon,  
25 and I -- I can't -- I can't recall clearly who was at

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1 this meeting. Obviously Dave Gordon was there. I  
2 recall discussing these topics, but I can't place  
3 exactly who was at that meeting.

4 Q. Well, do you remember meeting with Mr. Wells on  
5 that day?

6 A. I remember meeting with Mr. Wells on this topic  
7 at some point. If it was on this day, I'm not  
8 certain, but it would have been very close to this  
9 date certainly.

10 Q. Sir, the subject of this meeting is "BAT GROUP  
11 PROGRAM REVIEW;" correct?

12 A. Yes, it is.

13 Q. And this was a business meeting; wasn't it?

14 A. This was, yes.

15 Q. Did you have two meetings with Mr. Wells on  
16 February 17th, 1986, two different meetings?

17 A. I'm not certain.

18 Q. All right. Did you have two meetings with Mr.  
19 Gordon on February 17th, 1986?

20 A. I'm not certain of that either. I would think  
21 not. I believe I would have just spoken with Mr.  
22 Gordon about this program --

23 I'm sorry, are you saying February the 17th?

24 Q. Yes, sir.

25 A. Because that's the date of this memo. I think

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1 it refers --

2 Q. Ah.

3 A. -- to a discussion on February the 14th.

4 Q. Thank you.

5 Did you have two meetings with Mr. Wells to  
6 discuss the BAT Group program review?

7 A. I had a discussion with Mr. Wells regarding this  
8 topic, absolutely. I can't place exactly when the --  
9 the timing was.

10 Q. I'm trying to determine whether you had one or  
11 two discussions with Mr. Wells.

12 A. And unfortunately, I'm not certain.

13 Q. All right. You heard us refer earlier to the  
14 fact that there is a document which has -- strike  
15 that.

16 You heard us asseert -- discuss earlier the fact  
17 that there is a document that Brown & Williamson has  
18 claimed is privileged concerning a meeting that  
19 occurred between you, Mr. Wells and Mr. Esterle  
20 concerning the BAT Group program review. Do you  
21 recall that, sir?

22 A. I do recall it. I -- I didn't -- I --

23 I can't say that I recalled that actually Dr.  
24 Esterle was there, but if that's the fact, I've  
25 forgotten it, unfortunately.

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1 Q. Well approximately --

2 What I'm trying to determine is --

3 A. Yes.

4 Q. -- during the period from February 14th to  
5 February 17th, 1986, was there more than one meeting  
6 attended by you, Mr. Wells, Dr. Esterle and Dr. --  
7 and Mr. Gordon?

8 A. I -- I don't have an independent recollection of  
9 the meetings. I do -- I -- I do believe I've met on  
10 this topic with Mr. Gordon and perhaps Esterle, and  
11 in addition perhaps some of the other R&D senior  
12 managers.

13 Q. All right. But to the best of your knowledge  
14 there was only one such meeting; right, at  
15 approximately this time in 1986?

16 MS. FOX: Objection, form, vague. One  
17 meeting with Mr. Wells or one meeting with the  
18 scientists?

19 Q. I'm sorry, sir. Let me clarify my question.  
20 You --

21 You remember meeting with Mr. Wells on this  
22 subject.

23 A. Yes.

24 Q. You remember meeting with Mr. Wells, Mr. Gordon  
25 and Dr. Esterle on this subject.

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1 A. No. I don't recall who was -- who or if anyone  
2 was with me when I met with Mr. Wells. There may  
3 have been others, but I just --

4 At this point all I can remember is dealing with  
5 the -- the R&D people in terms of what the program  
6 is, which is what this lays out, and I do recall a  
7 discussion with Mr. Wells to -- just to get some  
8 counsel with regards to what I thought we should do.  
9 But I can't -- I'm sorry, just can't place these  
10 individual meetings and who were in them. I -- I  
11 remember the process generally, but precisely who was  
12 there I -- I don't recall.

13 Q. All right. Well let's focus on the meeting with  
14 Mr. Wells. That meeting concerned whether or how  
15 Brown & Williamson should receive documents from the  
16 BAT Group; right?

17 A. I would characterize it a little differently  
18 than that. It was -- it was basically --

19 MS. FOX: Just before you start, I'm going  
20 to instruct you -- I think that answer is fine and  
21 the question is fine, you can answer that question,  
22 Mr. Kohnhorst. I want you to be careful in answering  
23 the question not to reveal the contents of any  
24 communications with Mr. Wells, because those would be  
25 attorney-client privileged at the meeting with Mr.

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1 Wells, but you can answer the question as she asked  
2 it.

3 A. Could I just hear the question again?

4 Q. Sure.

5 Let's focus on the meeting with Mr. Wells. That  
6 meeting concerned whether or how Brown & Williamson  
7 should receive documents from the BAT Group; right?

8 A. As I started to say, I would characterize it  
9 differently than that. I had had meetings with the  
10 scientists and senior managers with R -- within R&D  
11 and had their recommendations regarding --

12 The whole topic here is the -- the group R&D  
13 program. I had their view in terms of what  
14 information they would like to get on a more frequent  
15 basis on project updates, I think they were referred  
16 to, and they came back with a recommendation that  
17 some things they wanted more frequently, some less.  
18 And the meeting then I had with Kendrick Wells was  
19 basically to inquire, as I recall, was there a -- was  
20 the approach we were taking, does it raise any  
21 concerns in terms of making a selection of what kind  
22 of information we -- we would like to have and what  
23 frequency.

24 Q. Just so we're clear here, you had this meeting  
25 because you had a business concern; isn't that right?

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1 MS. FOX: Objection, form.

2 A. Are -- are you referring to the meeting with  
3 myself and Kendrick Wells and maybe someone else  
4 that --

5 Q. Yes, sir.

6 A. Yes. A business concern, yes. I think, like a  
7 lot of things that I would do, whether it would be  
8 contracts or -- or communications, from time to time  
9 I would just check, be on firm grounds that I was,  
10 you know, acting appropriately in terms of, as I say,  
11 contracts or information or requests or handling of  
12 documents, because it is clearly a -- a -- you know,  
13 a very important issue.

14 Q. And you knew that there was information that was  
15 important, important to B&W's business, that was  
16 contained in documents that the BAT Group scientists  
17 were generating; right?

18 MS. FOX: Objection, form.

19 A. This was all about the group program, and -- and  
20 of course the -- the -- the big majority of what was  
21 in the group program the scientists that were  
22 involved with our R&D thought was important. In fact  
23 I think this document talks about -- this was the  
24 first cut -- 85 percent, roughly, of what was in the  
25 group program they saw not only as important or

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1 useful but they wanted frequent updates.

2 Q. And that's what you wanted, too, was to be able  
3 to get your scientists the information so that they  
4 could conduct their business; right?

5 A. That was --

6 I mean that's very consistent with setting up  
7 the group program, that we obviously would -- would  
8 get the information, the understandings -- the -- the  
9 data from the collective group program, yes.

10 Q. And that's what you wanted when you had this  
11 meeting with Mr. Wells, was to figure out a way to  
12 get that information that the scientists at B&W  
13 needed from the BAT Group scientists; right?

14 MS. FOX: Objection, mischaracterizes.

15 A. This all was in response from the -- the  
16 organization of this program. There was -- there was  
17 an inquiry, I believe, of all centers of what  
18 information they wanted and how and how frequent. So  
19 it was -- it was a response, as I recall, back to --

20 I believe Alan Heard was still coordinating this  
21 activity, and so we were -- we were providing him  
22 input. That input did -- did not say -- it -- it had  
23 certain partitions. We wanted -- I don't recall  
24 specifically all the details, but there was plans to  
25 have annual total reports that would show all the

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1 group program as well as updates, as I recall. Of  
2 course there would be reports on final completion of  
3 projects. And there was discussions about program  
4 updates on a -- a more frequent basis. And I believe  
5 this primarily addresses that last point, which is  
6 what reports we need on a more frequent basis, and --  
7 which turned out to be -- from the R&D's point of  
8 view, they were asking for about 85 percent of the  
9 information on a rapid basis.

10 Q. Now correct me if I'm wrong here, but before  
11 this meeting took place that's referred to in Exhibit  
12 324, you had asked that documents be sent to Mr.  
13 Maddox at Wyatt, Tarrant & Combs; right?

14 MS. FOX: Objection, mischaracterizes.  
15 This is a year later.

16 A. I think I -- I described that process. It -- it  
17 is totally -- totally a different process. Because I  
18 described that I, in -- in early '85, I believe, was  
19 not happy with some of the ambiguity in our  
20 documents, and I did some work in terms of our R&D.  
21 At that time I was at Brown & Williamson. I was  
22 concerned with some of the documents coming in  
23 from -- from -- from BATCO in terms -- again, the  
24 same problem, ambiguity, not defining the scope of  
25 documents. Interpretations, not the data. I talked

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1 with the senior managers about that. They tried to  
2 do some improvements.

3 I -- I did suggest, and -- and it was done for a  
4 limited amount of time, we had an external counsel  
5 review the -- the documents to provide some feedback  
6 in terms of the ambiguity, and this went on for a  
7 limited amount of time.

8 So this is about improving the quality of our  
9 writing. This is about what information we need on  
10 an ongoing basis and at what frequency through the  
11 whole program -- on the -- on the group research  
12 program.

13 Q. Sir, I'm going to move to strike as  
14 non-responsive.

15 My question is simply this: Before the meeting  
16 took place that's referenced in Exhibit 324, you had  
17 set up a process where Robert Maddox, a Louisville  
18 attorney, was sent BAT Group documents before they  
19 were sent to Brown & Williamson; right?

20 MS. FOX: Objection, form,  
21 mischaracterizes.

22 A. In -- in early 1985, as part of a -- a lot of  
23 steps that I had taken to try to improve the quality  
24 of the reporting -- and by "quality" I've been clear  
25 on the record, ambiguity, misinterpretation

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1 potentially of some of the documents, limitation on  
2 the importance of the results -- I did as one part of  
3 that program for a very small amount of time have  
4 documents -- not documents, but some reports flowing  
5 through Mr. Maddox. I didn't recall that name, but  
6 it's been raised here at the -- this deposition.

7 Q. Okay. And then --

8 A. But I'm not finished.

9 Q. Oh, I'm sorry.

10 A. So that was part of improving the quality of --  
11 of the writing and the clarity of the writing, not  
12 the data.

13 This (referring to Exhibit 324) is totally  
14 separate. And you're right in the sequence, that --  
15 that happened in early 1985; this is in now 1986  
16 where we're -- we're working toward what are the  
17 communication requirements from our perspective,  
18 giving it back to Alan Heard, who is putting  
19 together -- pooling the consensus, I guess, our views  
20 from all of the R&D centers, to put together one  
21 program in terms of how we communicate.

22 Q. Move to strike as non-responsive.

23 Sir, my question is simply this: Before the  
24 meeting took place that's referenced in Exhibit 324,  
25 you asked that documents from the BAT Group be sent

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1 to Mr. Maddox. "Yes" or "no."

2 MS. FOX: Objection.

3 Q. Simple question.

4 MS. FOX: Objection, argumentative, asked  
5 and answered, mischaracterizes and harassing.

6 A. I think the way you asked the question requires  
7 a broader description because it -- it implies some  
8 linkage, and there is absolutely no linkage between  
9 what took place in this area in 1986 that's described  
10 in this Plaintiffs' Exhibit 324 and a total separate  
11 process that had many activities, which was to  
12 improve the quality of the writing. And yes, that  
13 did take place in 1985. It was about making sure the  
14 documents were clear, well-written, reduced  
15 ambiguity. This (referring to Exhibit 324) was about  
16 what kind of information we want, on what topics and  
17 what frequency. Totally different and separate  
18 issues.

19 Q. Move to strike as non-responsive.

20 Sir, my question is simple, "yes" or "no."  
21 Before the meeting took place that's referenced in  
22 February 17th, 1986, didn't you ask that Mr. Maddox,  
23 a Louisville attorney, receive Brown -- BATCO  
24 documents instead of having them sent to Brown &  
25 Williamson?

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1 MS. FOX: Objection, asked and answered,  
2 mischaracterizes. And form.

3 A. You've described two very different processes.

4 Q. Sir, I'm going to move to strike as  
5 non-responsive.

6 MS. WIVELL: I suggest we go off the record  
7 because -- and that you talk to your witness about  
8 answering this question directly; otherwise, I'll be  
9 forced to call the court and ask the court to direct  
10 the witness to answer the question. It is a very  
11 simple question.

12 MS. FOX: Well --

13 MS. WIVELL: I'm not implying anything by  
14 it. It doesn't require a speech. I moved to strike  
15 it four or five times, the speech. The question is a  
16 "yes" or "no" answer. Why don't we go off the  
17 record and see if we can avoid a court conference on  
18 this matter.

19 MS. FOX: I -- I don't think we need to go  
20 off the record on this one. Your question is  
21 misleading. It is clearly implying that the events  
22 in 1985 are linked to the events in 1986. If you  
23 want to ask him did, in 1985, for the -- as he has  
24 testified before, was there a period of time where  
25 reports were reviewed by counsel, that's a question

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1 you can ask. And if you want to ask him what  
2 happened in 1986, that's certainly a question you can  
3 ask. But to imply in your question that something  
4 that occurred in 1985 is linked to something that  
5 occurred in 1986 by linking those those dates, that's  
6 objectionable.

7 MS. WIVELL: I haven't said anything about  
8 linkage, Ms. Fox.

9 MS. FOX: I think if you review your  
10 question, it implies linkage. And Mr. Kohnhorst is  
11 trying to respond fairly to your question.

12 MS. WIVELL: If we have to get the court to  
13 supervise this deposition, I'm perfectly happy to  
14 have him supervise the rest of it. We have wasted an  
15 inordinate amount of time with me asking the witness  
16 simply "yes" or "no" questions and then the witness  
17 giving a speech. I --

18 We'll bring him back from England if we have  
19 to. I don't care. And -- and this deposition is  
20 going to go forward. If we have to get the court  
21 involved, I'll do that. I have no problem doing  
22 that.

23 I would like to take a break. I would like you  
24 to talk to your -- to your witness about this  
25 matter. You know that he has the opportunity to --

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1 to present any information he wants while you do your  
2 direct examination.

3 Let's go off the record.

4 MS. FOX: I'd like to respond to that and  
5 then we can go off the record. You are entitled to  
6 fair answers to fair questions. When you ask unfair  
7 questions that are not clear, that have misleading  
8 assumptions built into them, the witness is entitled  
9 to fairly answer that question so it doesn't leave a  
10 misleading impression, and that is what he has done.  
11 I believe he has been responsive to your questions.

12 But we can go off the record if you like.

13 THE REPORTER: Off the record, please.

14 (Recess taken.)

15 BY MS. WIVELL:

16 Q. Sir, before the meeting that occurred on  
17 February 17 -- I'm sorry. Strike that.

18 Before the meeting that occurred that's  
19 referenced in the Exhibit 324, you had asked that  
20 BATCO Group documents be sent to Mr. Maddox of Wyatt,  
21 Tarrant & Combs; correct?

22 MS. FOX: Note my objection to the  
23 question. I think the witness has been responsive to  
24 your question -- your -- your question in his prior  
25 answers, but in the effort to avoid disputes, I'll

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1 allow the witness to attempt to answer the question  
2 again.

3 A. I will agree that the events that you described  
4 in 1985 definitely occurred before the events that  
5 you described in -- in 1986.

6 Q. Thank you.

7 Now sir, and before the events that are  
8 referenced in Exhibit 324, you had directed Mr.  
9 Reynolds and Dr. Esterle to get Mr. Wells involved if  
10 their -- they had questions about whether sensitive  
11 issues were contained in BAT Group documents that  
12 were headed for the R&D library; right?

13 MS. FOX: Same objections to the prior  
14 question.

15 A. I'll need to hear that again.

16 Q. Okay. Now sir, before the events that are  
17 referenced in Exhibit 324, you had directed Mr.  
18 Reynolds and Dr. Esterle to get Mr. Wells involved,  
19 that they had questions about whether sensitive  
20 issues contained in B.A.T. documents should be put  
21 into the R&D library.

22 MS. FOX: Same objections.

23 A. You may be --

24 I'm trying to recall what you might be referring  
25 to. I -- I -- I definitely recall that I had sent a

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1 memo, in fact, some time in the past to Dr. Esterle  
2 asking him to review documents, and if he had any  
3 questions in his mind regarding -- and I don't  
4 remember exactly my words -- areas of sensitivity,  
5 that he would get counsel or review with Kendrick  
6 Wells to -- to get any advice, and if he had any  
7 concerns about documents going into the library,  
8 sensitive documents going into the library, that he  
9 would bring it to my attention. And I believe I also  
10 said in the previous testimony that I don't recall,  
11 and I would, that Dr. Esterle ever brought any to my  
12 attention.

13 Q. Sir, now yesterday we looked at Exhibit 80 and I  
14 gave you a copy, and I've just handed you another.  
15 That's the memo you just referred to in your  
16 immediately preceding answer; right?

17 A. Yes, it is.

18 Q. Okay. And that --

19 And again, that memo is dated April 19th, 1985;  
20 right?

21 A. Yes.

22 Q. And says that if these people, Mr. Esterle and  
23 Mr. Reynolds, had any concerns about sensitive  
24 issues, they were to review with Mr. Kendrick Wells  
25 the documents before submitting them to the R&D

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1 library; right?

2 A. It doesn't say exactly that. I did give a copy  
3 of this to Mr. Reynolds, as -- as it shows here, and  
4 this -- this was addressed to -- to Dr. Esterle, and  
5 I --

6 I'm really asking Dr. Esterle, who is one of our  
7 scientists, to "...pay particular attention to any  
8 sensitive issues," and I'm reading, "...and, in  
9 case -- in cases where you have concerns, you should  
10 review with Mr. Kendrick Wells prior to submission to  
11 the library...." And I go on to say, "In addition,  
12 please call my attention to any reports you feel  
13 should not be held in the library."

14 Q. And this document refers to BAT Group documents;  
15 right?

16 MS. FOX: Objection, form.

17 A. It -- it does refer to specifically in the  
18 document research centers, which would include those  
19 that we've identified previously, so it would be  
20 BATCO, Souza Cruz, Canada and others.

21 Q. Now sir, isn't it a fact that from the time that  
22 you wrote Exhibit 80 until the meeting that's  
23 referenced in Exhibit 324, you had determined that  
24 there wasn't any way to keep sensitive information  
25 effectively away from Brown & Williamson scientists?

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1 A. There was never any intention on my part to keep  
2 sensitive information away from Brown & Williamson  
3 scientists. There was a -- a lot of concern on my  
4 part that the documents be well written, and the  
5 scientists themselves were making a determination in  
6 terms of what they felt like they needed in -- in all  
7 these -- these actions.

8 Q. Now isn't it true that B.A.T. -- I'm sorry.  
9 Strike that.

10 Isn't it true that you and Mr. Wells determined  
11 that B.A.T. would find a way to get information to  
12 B&W scientists through phone calls or other methods?

13 MS. FOX: Objection. I think the way that  
14 question is phrased it may impinge on attorney-client  
15 privileges, as asked. If you're asking if a  
16 determination was made by Mr. Kohnhorst, that's fine,  
17 but if you're asking for communications between Mr.  
18 Kohnhorst and Mr. Wells, --

19 MS. WIVELL: I'll rephrase.

20 MS. FOX: -- I will again instruct him not  
21 to answer.

22 MS. WIVELL: I'll rephrase.

23 Q. Isn't it true that in the intervening period you  
24 determined that there just wasn't any way you could  
25 keep sensitive information from the BAT Group

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1 documents from getting into Brown & Williamson's  
2 hands, sir?

3 MS. FOX: Objection, vague, and asked and  
4 answered.

5 A. I -- I really -- I really did not have any  
6 problems with our scientists seeing -- being involved  
7 with any of the research. In fact, I think over the  
8 years there must be a lot of record that shows I  
9 really supported the exchange of information,  
10 including exchange of scientists across centers, and  
11 of course that opens -- each one of these scientists  
12 opens the door to everything that's going on in that  
13 center. So I really feel like I -- I promoted the  
14 exchanges as opposed to resisted it.

15 Q. Sir, have you ever seen the document that  
16 Kendrick Wells wrote that's dated February 17th, 1986  
17 concerning his meeting with you regarding the BAT  
18 Group program review?

19 A. I don't recall it right now.

20 Q. Is that a "yes" or a "no," sir?

21 MS. FOX: Objection, asked and answered.

22 A. Could you repeat the question?

23 Q. Have you ever seen the document Kendrick Wells  
24 wrote dated February 17th, 1986 concerning the  
25 meeting he had with you regarding the BAT Group

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1 program review?

2 A. I may have. Right now I can't recall that  
3 document.

4 Q. Sir, isn't it true that the system that's  
5 described in Exhibit 324 as being set up to get  
6 information was designed specifically to make sure  
7 that important sensitive information didn't fall into  
8 the hands of plaintiffs' attorneys?

9 A. I -- I don't believe so. What this document  
10 describes is -- is just one part of the total  
11 communications, and it's just the semiannual  
12 reporting. We still get the total program, which  
13 really has all this program in it on a yearly basis,  
14 as I understand. And in addition, these were  
15 recommendations, and as I recall the -- the computer  
16 system was set up that gave us access to all the  
17 information as all the others had.

18 Q. Just -- just so we're clear here and the ladies  
19 and gentlemen of the jury understand, before this  
20 system that's described in Exhibit 324 was set up,  
21 Brown & Williamson was getting full reports; right?

22 MS. FOX: Objection, vague.

23 MS. WIVELL: I'll agree. Let me withdraw  
24 the question.

25 Q. Sir, just so we're clear here and the ladies and

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1 gentlemen of the jury understand, before the system  
2 that's described in Exhibit 324 was set up, Brown &  
3 Williamson was receiving full reports from BAT Group  
4 companies; correct?

5 MS. FOX: Same objection.

6 A. Over the years and continually, as far as I'm  
7 aware, we -- we did get full reports on completed  
8 work areas. This was, of course, now a very, very  
9 new program, because now we're talking about going  
10 from a centralized R&D to a decentralized, and of  
11 course this program is new. All the groups R&D's are  
12 involved with it. And this work -- this talks about  
13 the communications on this particular work. But I  
14 also believe that from time to time when work areas  
15 were completed, we would still get complete reports.

16 Q. From time to time, but not on a regular basis;  
17 right, sir?

18 MS. FOX: Objection, mischaracterizes.

19 A. I think there would be more reporting here  
20 because there's -- there's annuals and even updates,  
21 you know, in -- in -- semiannual updates. I would  
22 still think the same decision, when work is completed  
23 and is significant, they would write a report and it  
24 would be shared, but -- to the best of my knowledge.

25 Q. All right. But just so the ladies and gentlemen

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1 understand, where in the past you used to get the  
2 full report --

3 And we've seen lots of those reports as exhibits  
4 in this deposition; haven't we, sir?

5 MS. FOX: Objection, form.

6 A. We haven't looked at very many what I'd call  
7 major reports. We've certainly looked at a lot of  
8 conferences. You might call my attention to a number  
9 of them.

10 Q. All right. Well in preparation -- strike that.

11 Brown & Williamson had received full reports in  
12 the past from the BAT Group companies. We've  
13 established that. Right?

14 MS. FOX: Objection, form.

15 A. I'm aware of receiving full reports from a lot  
16 of the associate companies on R&D, and engineering  
17 activities, and manufacturing.

18 Q. And as a result of the system which was set up  
19 in response -- or I'm sorry.

20 In Exhibit 324, Brown & Williamson got little  
21 synopses, a paragraph or two about each report;  
22 correct?

23 MS. FOX: Objection, mischaracterizes.

24 A. We -- we definitely did get synopses on a  
25 six-month basis. We got a full program review on an

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1 annual basis. And to my knowledge, there would still  
2 be full reports on -- on major areas. But in  
3 addition, there was a lot more collaboration now, so  
4 we had people working much closer together, which I  
5 think probably would reduce some of these just for  
6 recording research as the only way of communicating,  
7 because we now have -- and I think the document is  
8 clear -- multiple centers actually working on the  
9 same work. So we had actually a coordinator that  
10 would be responsible for a work area that would be  
11 done at maybe three different R&D centers  
12 simultaneously.

13 Q. Sir, and isn't it a fact that this system was  
14 set up with one of its purposes in mind to prevent  
15 sensitive information from getting into the hands of  
16 plaintiffs' attorneys?

17 MS. FOX: Objection, mischaracterizes.

18 A. I believe the system was being set up, and it  
19 was being directed by Alan Heard, and I -- I believe  
20 his objectives clearly were to increase the  
21 effectiveness of communication on scientific matters  
22 within the group. I'm sure that was his objective.

23 Q. Sir, and wasn't one of the other objectives to  
24 make sure that sensitive information from these  
25 programs did not find its way into the hands of

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1 plaintiffs' attorneys?

2 MS. FOX: Asked and answered.

3 A. I don't -- I don't believe the program was -- on  
4 the computer database or any of the others were --  
5 was set up to -- to in some way impede -- forgot the  
6 word you used -- plaintiffs' attorneys finding this  
7 information. I think it was to -- to develop a good  
8 method and an effective method for scientific  
9 exchange.

10 Q. Has anyone ever shared with you the statements  
11 that were made by Kendrick Wells about this process  
12 that he made in the memo that he wrote about this  
13 meeting, February 17th, 1986?

14 A. I don't believe I -- I recall seeing that memo.  
15 I may have. If you show me, it may refresh my  
16 memory. I don't recall seeing that.

17 Q. Sir, I can't show it to you because the  
18 defendants in this case have claimed it to be  
19 privileged. And my question was not, this time,  
20 whether you saw it, but whether anyone had shared  
21 with you what Kendrick Wells said about this system  
22 that is referred to in Exhibit 324 in the memo that  
23 he wrote about the meeting on February 17th -- the  
24 meeting -- the memo that he wrote dated February  
25 17th, 1986.

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1 MS. FOX: I'm going to object at this point  
2 in time. To the extent that you're inquiring into  
3 communications between counsel, I'm going to instruct  
4 Mr. Kohnhorst not to answer the question. To the  
5 extent that you're inquiring whether anyone outside  
6 of counsel had communications with Mr. Kohnhorst  
7 without counsel present, I will allow him to answer  
8 that question.

9 BY MS. WIVELL:

10 Q. Well sir, wasn't David Gordon told that he  
11 should talk to Heard and to sanitize information  
12 about biological activity with regard to Project 487?

13 A. What -- what does Project 487 --

14 Oh. Is it in this document?

15 MS. FOX: I'm going to object as well in  
16 terms of the question, it's vague. Told by whom?

17 MS. WIVELL: Well let me rephrase the  
18 question.

19 Q. Was David Gordon, as a result of the meeting  
20 that's reflected in Exhibit 324, told to contact Alan  
21 Heard to make sure that the report concerning Project  
22 487 was sanitized so that it didn't contain  
23 information about biological activity?

24 MS. FOX: Again, I'm confused by told by  
25 whom? If -- if you're inquiring into conversations

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1 between Mr. Kohnhorst and Mr. Gordon without counsel  
2 present, he may answer that question. And I'm not  
3 trying to be difficult here, I just want to make sure  
4 that you're inquiring about communications where  
5 counsel wasn't present.

6 Q. Sir, could you turn to page -- or the page Bates  
7 number 354.

8 A. Yes.

9 Q. There's reference to a Project 487, "Ambient  
10 Smoke Nitrosamines;" correct?

11 I'm sorry.

12 MS. FOX: What page are you on?

13 Q. Strike that. Start again.

14 Could you turn to the page Bates numbered 354.

15 A. Yes, I'm there.

16 Q. And do you see reference to a Project 487,  
17 "Sidestream Visibility?"

18 A. Yes, I see it.

19 Q. And isn't it true, sir, that David Gordon was  
20 told to contact Alan Heard to make sure that that  
21 project, before it reached Brown & Williamson's  
22 hands, contained no reference to biological  
23 activity?

24 MS. FOX: Again I'm going to object to the  
25 question as being vague. Told by whom?

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1 MS. WIVELL: Anyone.

2 MS. FOX: Okay. I'm going to instruct Mr.  
3 Kohnhorst that he can answer with respect to  
4 communications between himself and Mr. Gordon. To  
5 the extent that there were, if any, communications  
6 between counsel and Mr. Gordon, I'm going to instruct  
7 Mr. Kohnhorst not to answer that question.

8 MS. WIVELL: Well I do believe that this is  
9 business advice, the lawyer has -- or the witness has  
10 told us it's business advice, and I want an answer to  
11 this question, was he told by anybody.

12 MS. FOX: I -- I disagree with you. He's  
13 told you that there was business advice and then  
14 there was going to Mr. Wells for things like contract  
15 obligations, which I believe is legal advice. But in  
16 any case my objection stands and I'm going to  
17 instruct Mr. Kohnhorst that he cannot answer or  
18 reveal the communications of counsel between Mr.  
19 Counsel -- counsel and Mr. Gordon, if he's aware of  
20 any such communications. But if he's aware of  
21 communications outside the presence of counsel, he  
22 may communicate that. And if he is aware of any  
23 facts, he may communicate that.

24 A. I'm sorry, I don't have very much recollection  
25 on this topic at all. I'm looking at what -- the

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1 reference you've pointed me to, this 487 with the  
2 asterisk, and the title is "Sidestream Visibility,"  
3 if I'm on -- on track with where you're pointing me.

4 Sidestream visibility sounds like a -- a project  
5 that -- that would be clearly defined just by the --  
6 the title, which would be work regarding optics and  
7 aerosol density, visible aerosol density. It doesn't  
8 sound like anything to do with chemistry. But I --  
9 I --

10 Really, to answer the question precisely, I  
11 don't recall any advice given to David Gordon to  
12 sanitize anything. I -- I think there -- there were  
13 certainly discussions regarding clarity. But  
14 "sanitize" I think means something else; it sounds  
15 like perhaps "change results," and I don't think  
16 David was ever given advice like that.

17 Q. All right. Well let me rephrase the question  
18 then. Isn't it a fact that David Gordon was told to  
19 contact Alan Heard to make sure that before Brown &  
20 Williamson received report number 487, that it  
21 contain nothing concerning the biological activity of  
22 sidestream smoke?

23 MS. FOX: Same objection. Mr. Kohnhorst,  
24 I'm going to instruct you that to the extent that  
25 you're aware of communications outside of counsel's

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1 presence with respect to Dave Gordon, you may  
2 communicate those communications, you may communicate  
3 any facts, but you cannot communicate them and I'm  
4 going to instruct you not to communicate discussions  
5 with counsel.

6 A. I just don't -- I don't have any recollection  
7 of -- of Dave getting any instructions regarding this  
8 particular project area.

9 Q. Sir, isn't it true that as a result of this  
10 meeting, certain projects were defined as not  
11 interesting, in quotes, to Brown & Williamson, and  
12 therefore would not be obtained by them?

13 MS. FOX: I'm going to object to the form  
14 of the question. What meeting? It's vague.

15 A. In this particular document that we've been  
16 referring to, 324, and I -- as I said earlier,  
17 there -- there were projects that were excluded, and  
18 that was a recommendation to exclude projects.  
19 Include it was about 85 percent; 16 percent, it says  
20 here, was the recommendation to exclude. This was a  
21 recommendation in response, as I recall, to Alan  
22 Heard who was setting up the program, and to the best  
23 of my knowledge the -- the total program was  
24 communicated.

25 So this was a recommendation. It was obviously

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1 not accepted. And we got all the information on  
2 the -- that was being asked for in this group  
3 program, is -- to the best of my knowledge.

4 Q. I guess that's my point, sir. Isn't it true  
5 that you defined the program so it specifically  
6 wouldn't ask for sensitive material so that it  
7 wouldn't fall in the hands of the plaintiffs'  
8 lawyers?

9 MS. FOX: Objection, mischaracterizes.

10 A. There was a recommendation here to exclude some  
11 information. There were recommendations coming from  
12 the other centers simultaneously. The decision was  
13 made by Alan Heard, and as I understand, the system  
14 was set up. It provided the same information to --  
15 to all the group. I don't believe that these  
16 recommendations really were accepted.

17 Q. Well sir, it says on the second page of Exhibit  
18 324 --

19 A. Yes.

20 Q. -- "Regarding information we obtain from the  
21 system, it was agreed that myself and Gil Esterle  
22 would review and alert the Law Department on new  
23 entries or updates which may need review;" right?

24 A. That -- that's what it says, yes.

25 Q. In other words, there still was this alert that

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1 wanted to keep sensitive material out of the hands of  
2 Brown & Williamson; right?

3 MS. FOX: Objection, form.

4 A. This is --

5 You read this -- exactly what it says. The fact  
6 is that the system provided all the information  
7 regardless of what we said we needed. And I think  
8 it's very appropriate that if there are issues that  
9 would be coming through in terms of new research,  
10 that our scientists would alert the legal  
11 department. They may have to understand the  
12 implications on smoking and health.

13 Q. And it's your testimony that the reason that --  
14 about this alert was because of new research and not  
15 trying to keep it out of the hands of plaintiffs'  
16 attorneys who were trying to obtain these documents  
17 through discovery?

18 MS. FOX: Objection.

19 Q. Is that your testimony, sir?

20 MS. FOX: Objection, form.

21 A. I think the -- alerting the legal counsel of  
22 developments that would be new would -- would be  
23 multiple reasons. One I've already said, which is to  
24 alert them to any issues in the science, or more  
25 likely even in language that's in reports, because

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1 they need to understand what -- what implications  
2 that might have in the smoking and health. Documents  
3 that are received are preserved; as I've said, we had  
4 legal holds on ever since I got any responsibility  
5 in -- in R&D. So I don't know how that -- how that  
6 prevents them from getting into the hands of the  
7 plaintiffs.

8 Q. Well sir, if Brown & Williamson doesn't get them  
9 in the first place, they can't turn them over to  
10 plaintiffs' lawyers; right?

11 MS. FOX: Objection, argumentative.

12 A. Well I -- I don't know about that process.

13 If -- I --

14 I don't know the extent of subpoenas, but I  
15 think if -- if Brown & Williamson selects information  
16 that we find useful and for our market and -- and  
17 scientifically valid information that we bring in and  
18 preserve, that seems like a -- a reasonable right  
19 that we would have.

20 Q. And you're telling the ladies and gentlemen of  
21 the jury, I just want to make sure we're absolutely  
22 clear, that at the meeting that you had to discuss  
23 the BAT Group program review, there was no discussion  
24 at all about keeping materials out of the hands of  
25 the plaintiffs' lawyers. Is that your -- your

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1 testimony?

2 MS. FOX: Objection, form, vague. What  
3 meeting?

4 A. Meetings that I had with the lawyers --

5 MS. FOX: I'm going to instruct you not to  
6 talk about the contents of any meetings where lawyers  
7 were present. You can talk about the content of  
8 meetings where lawyers weren't present and you can  
9 talk about general subject area where lawyers were  
10 present at a meeting, but in terms of individual  
11 communications, which I believe this question would  
12 call for, I'm going to instruct you not to answer and  
13 provide the communications with counsel.

14 A. I'm sorry, could I hear the question again?

15 Q. Sure.

16 You're telling the ladies and gentlemen of the  
17 jury that at the meetings that you had to discuss the  
18 BAT Group program review, there was no discussion at  
19 all about trying to keep materials out of the hands  
20 of plaintiffs' lawyers by limiting what was sent by  
21 BAT Group companies; right?

22 MS. FOX: Now I'm going to object because  
23 you're referring to multiple meetings, and because  
24 this is an area which may implicate privilege, I  
25 think it's important to know which meeting you're

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1 referring to.

2 MS. WIVELL: All right. Let me rephrase  
3 the question.

4 Q. You're telling the ladies and gentlemen of the  
5 jury here that at the meeting you had to discuss the  
6 BAT Group program review, there was no discussion at  
7 all about trying to keep information out of the hands  
8 of plaintiffs' lawyers by making sure Brown &  
9 Williamson never got it in the first place.

10 MS. FOX: I'm going to again object to the  
11 form of the question, once again, because it could  
12 implicate privilege. The meeting with whom?

13 MS. WIVELL: Go ahead.

14 MS. FOX: Well I'll instruct you, Mr.  
15 Kohnhorst, you can talk about meetings -- meetings  
16 with scientists and you can talk about the meeting  
17 that you had with scientists without counsel being  
18 present, but communications at a meeting that you had  
19 with Mr. Wells I'm going to instruct you not to  
20 reveal.

21 MS. WIVELL: You're instructing him not to  
22 answer my question?

23 MS. FOX: No, I'm -- your question is vague  
24 because you've referred to "the meeting." The  
25 witness has testified that there were multiple

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1 meetings.

2 MS. WIVELL: No, the witness has testified  
3 he's not sure whether there were multiple meetings.

4 MS. FOX: Well in any case, then, it's  
5 unclear and I think your question ought to be clear  
6 and not refer to "the meeting" since he's not sure.

7 MS. WIVELL: I said the meeting concerning  
8 BAT Group program review. I was very specific.

9 MS. FOX: The same objection.

10 MS. WIVELL: You're instructing him not to  
11 answer?

12 MS. FOX: I'm asking for clarity in --  
13 in -- in the questions. And I think the witness is  
14 unclear on whether there were multiple meetings or  
15 not concerning that topic.

16 MS. WIVELL: Well I really resent the game-  
17 playing. I have tried to establish whether there was  
18 one meeting or more meeting. I get "I don't really  
19 remember."

20 BY MS. WIVELL:

21 Q. Sir, was there one meeting with Wells, Esterle,  
22 Gordon and you, or was there more than one meeting?

23 MS. FOX: More than one meeting with  
24 Esterle, Wells, Gordon and him?

25 MS. WIVELL: Yes.

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1 MS. FOX: Okay.

2 A. I can just try to describe, without taking too  
3 much time, the best I can recall. I wish I could  
4 recall better. It's more than 10 years ago.

5 Q. It certainly would have helped if you had been  
6 shown the document that Wells wrote.

7 MS. FOX: Objection, argumentative.

8 Q. Go ahead, sir.

9 A. There were meetings within R&D, and they would  
10 be principally -- and I wasn't involved with all of  
11 them, but it was Lance Reynolds and -- and Tilford  
12 Riehl, Esterle and Gordon. At some point I had, the  
13 best of my recollection, a preliminary review of what  
14 they wanted from the group program. It appears to me  
15 and in this document that Dave Gordon has captured in  
16 a final form what the scientists within R&D are  
17 proposing. It --

18 I do remember speaking with Mr. Wells later, and  
19 I don't know who was there or if this -- so I don't  
20 know who was there, if there was anyone, in addition  
21 to Mr. Wells. But I was basically taking forward my  
22 recommendation in terms of how we proceed in terms of  
23 the recommendations that now we're going to make to  
24 Alan Heard. In fact Dave Gordon is going to -- you  
25 know, is -- is going to pass this recommendation to

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1 Alan Heard.

2 I -- I got that advice from Kendrick Wells in  
3 terms of the definition of what he saw as issues or  
4 not issues and -- and acted accordingly.

5 Q. All right. Let's focus on your discussion with  
6 Mr. Wells.

7 Isn't it a fact, sir, that Mr. Wells told you  
8 that research documents containing sensitive material  
9 should not even be received by Brown & Williamson?

10 MS. FOX: I'm going to object and instruct  
11 you not to answer the question. Calls for  
12 attorney-client privilege.

13 Q. Sir, isn't it true that what you discussed with  
14 Mr. Wells was how to prevent documents getting into  
15 the hands of plaintiffs' lawyers by preventing Brown  
16 & Williamson from even obtaining them in the first  
17 place?

18 MS. FOX: Same objection. I'm going to  
19 instruct you not to answer, it calls for  
20 attorney-client privilege.

21 Q. Sir, isn't it true that Mr. Wells instruct --

22 (Telephone rings.)

23 BY MS. WIVELL:

24 Q. Sir, isn't it true that Mr. Wells instructed you  
25 that certain projects were to be reviewed, especially

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1 Projects 487 and 453?

2 MS. FOX: I'm going to instruct you not to  
3 answer, it calls for attorney-client privilege.

4 Q. Sir, isn't it true that Exhibit -- I'm sorry.

5 Isn't it true that Mr. Wells told you that Exhibit --  
6 I'm sorry, let me start again.

7 Sir, isn't it true that Project 487, which we  
8 have discussed before, was a project that Mr. Wells  
9 told you specifically that Brown & Williamson was not  
10 interested in if it contained evidence of biological  
11 activity?

12 MS. FOX: I'm going to instruct you not to  
13 answer, calls for attorney-client privilege.

14 Q. Sir, isn't it --

15 MS. FOX: Go ahead.

16 Q. Isn't it true that Mr. Wells told you to have  
17 David Gordon contact Alan Heard to make sure that  
18 Project 487 did not include any biological activity  
19 before it was sent to Brown & Williamson?

20 MS. FOX: I'm going to instruct you not to  
21 answer, calls for attorney-client privilege.

22 Q. Sir, did David Heard ever -- I'm sorry. Let me  
23 start again.

24 Sir, did David Gordon ever contact Alan Heard to  
25 determine whether Project 487 contained information

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1 pertaining to biological activity?

2 MS. FOX: That particular question I think  
3 you can answer, Mr. Kohnhorst, if you know.

4 A. I -- I don't know what Dave Gordon did other  
5 than to communicate our -- our recommendations.

6 And -- and as I said, these recommendations went in,  
7 and -- and ultimately we got all this information.

8 Q. Did you ever tell Dave Gordon to call Alan Heard  
9 to make sure that Project 487 did not contain any  
10 reference to biological activity before Brown &  
11 Williamson received it or a synopsis of it?

12 MS. FOX: Again, Mr. Kohnhorst, to the  
13 extent that you did tell Mr. Gordon that outside the  
14 presence of counsel, that's fine, you may respond and  
15 answer that question.

16 A. I -- I don't -- I don't recall giving any  
17 instruction like that to Dave Gordon. And I would  
18 find it to be inconsistent. If -- if there were --  
19 and there are concerns, and undoubtedly there were on  
20 some of these areas, that we would want to make sure  
21 of -- of two things, and -- and one is, is our  
22 original assessment that this is going to be useful,  
23 is it valid? Or two, if it is an area of sensitive  
24 information, if it gets into, as you just pointed out  
25 here, biological components of a side stream

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1 visibility project, we would want to make sure that  
2 they report accurately the limitations on these  
3 findings. Because it -- it's -- it's one thing to do  
4 an Ames test, it's another to say that this is --  
5 this is a positive determination on -- on toxicity  
6 out -- and without defining what system is being  
7 used.

8       So yes, there was -- there were areas of  
9 sensitivity. I think we were both looking to see are  
10 they relevant for us, and two, if they're going to  
11 report on sensitive areas, that they take care in --  
12 in reporting it in its full context.

13 Q.   Move to strike as non-responsive.

14       Sir, my question is simply this: Did you ever  
15 tell David Gordon to contact Alan Heard to determine  
16 whether Project 487 contained information regarding  
17 biological activity?

18       MS. FOX: Asked and answered.

19 A.   Actually I -- I may have misunderstood the  
20 previous question. The previous one, I thought I was  
21 being asked if I was directing some change, and this  
22 one, if I'm understanding, you're asking did I just  
23 ask for information, what is contained in it.

24 Q.   Yes, sir.

25       MS. FOX: Well I withdraw my objection. I

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1 apologize, Marti.

2 A. I -- I don't recall, but it seems very  
3 reasonable that I -- I might have done that.

4 Q. And did you --

5 Do you remember doing that?

6 A. No. I just said it seems very consistent that I  
7 might have done that.

8 Q. Did David Gordon ever report to you that he had  
9 talked to Alan Heard about whether Project 487  
10 contained information regarding biological activity?

11 A. I'm sorry, I -- I -- I really -- I really  
12 have -- really don't know if he did. I don't have  
13 any recollection of him reporting back on any of  
14 these projects, frankly.

15 Q. Did Kendrick Wells ever tell David Heard -- no.  
16 Start again.

17 Did Kendrick Wells ever tell David Gordon to  
18 contact Allen Heard regarding Project 487 to make  
19 sure that it doesn't contain any information  
20 regarding biological activity?

21 MS. FOX: I'm going to object and instruct  
22 you not to answer, calls for attorney-client  
23 privilege.

24 Q. Sir, do you see reference in Exhibit 324 to  
25 Project 453 on the page that ends Bates number 352?

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1 A. 453?

2 Q. Yes, sir.

3 A. Yes.

4 Q. And that project is entitled "Cut" -- no, I'm

5 sorry, "Nicotine Within the Smoker;" right?

6 A. Yes.

7 Q. Now sir, isn't it true that a -- a determination

8 was made to see, before Brown & Williamson received

9 any reports on Project 453, whether it contained

10 information on the pharmacological effects of

11 nicotine?

12 A. Just trying to see if I could find the reference

13 to 453 that would describe it.

14 Q. There is no little synopsis here; --

15 A. Oh, okay.

16 Q. -- is there, sir?

17 A. That's what I was looking for. I don't see it.

18 Q. My question was: Isn't it true that a

19 determination was made that before Brown & Williamson

20 received any report on Project 453 --

21 MS. FOX: Um --

22 Q. -- it had --

23 MS. FOX: I'm sorry to interrupt you, but

24 there is a synopsis on Project 453, and I just wanted

25 to --

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1 MS. WIVELL: Okay.

2 MS. FOX: -- direct your attention to it,  
3 Ms. Wivell.

4 MS. WIVELL: All right. Since neither the  
5 witness nor I could find it, could you direct our  
6 attention to it, please?

7 MS. FOX: 360.

8 MS. WIVELL: 360, thank you.

9 MS. FOX: I just wanted the record to be  
10 clear.

11 MS. WIVELL: Fair enough.

12 MS. FOX: It's the third one from the  
13 bottom of the page.

14 MS. WIVELL: Got you. All right.

15 BY MS. WIVELL:

16 Q. Sir, directing your attention to page 360, there  
17 is a brief synopsis Project 453; right?

18 A. Yes.

19 Q. And the project title for that was "SMOKER  
20 REACTION/BEHAVIOUR: PRODUCT TESTING: THE INFLUENCE  
21 OF NICOTINE ON THE SMOKER."

22 A. "WITHIN THE SMOKER," yes.

23 Q. "WITHIN THE SMOKER." Thank you.

24 And sir, isn't it a fact that as a result of the  
25 meeting that took place, Brown & Williamson employees

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1 contacted B.A.T. to determine whether that report  
2 contained information on the pharmacological effects  
3 of nicotine?

4 A. May I just read this first?

5 Q. Certainly.

6 A. Thank you.

7 So could you read the question back for me,  
8 please?

9 Q. Certainly.

10 Sir, isn't it a fact that as a result of the  
11 meeting that took place, Brown & Williamson employees  
12 contacted B.A.T. to determine whether the report  
13 contained information on the pharmacological effects  
14 of nicotine?

15 MS. FOX: Objection, form.

16 A. Well it seems that the -- the description does  
17 indicate that there are going to be tests about the  
18 pharmacological effects of nicotine. There's a  
19 reference to that here. The --

20 I would think if we are looking into what is the  
21 detailed plans, because we're not -- I don't believe  
22 we're talking about reports, we're talking about  
23 projects that are going on the -- the -- the central  
24 research program, and -- and this would be in  
25 Germany, so I would assume that contact would have

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1 been to Germany if there was any clarification of  
2 that program.

3 Q. Isn't it true that there was concern on Mr.  
4 Wells' part that if this report included discussions  
5 of the addictive effect of nicotine, that it would be  
6 helpful to plaintiffs' attorneys?

7 MS. FOX: I'm going to object, instruct you  
8 not to answer that question to the extent that  
9 information you have is communications with Mr.  
10 Wells.

11 A. I apologize again. Could you read the question?

12 Q. Certainly.

13 Isn't it true that there was a concern on Mr.  
14 Wells' part that if this report, report 453, included  
15 discussions of the addictive effect of nicotine, it  
16 would be helpful to plaintiffs' attorneys?

17 MS. FOX: The same objection. I'm going to  
18 instruct you not to answer to the extent that the --  
19 the information you have is communications with Mr.  
20 Wells.

21 A. I'm -- I'm unaware of what Kendrick Wells'  
22 concerns would have been about this particular area  
23 of work, if any. And I -- I certainly, with my  
24 familiarity with -- with the German program, which is  
25 limited, have never heard it expressed or a concern

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1 that they're doing work on nicotine addiction. But  
2 I'm not very close to the work, I have to say.  
3 Q. Sir, isn't it a fact that concern was expressed  
4 at the meeting that if report 453 -- or Project 453  
5 contained discussions on the pharmacological effects  
6 of nicotine, it might be helpful to plaintiffs'  
7 lawyers?

8 MS. FOX: The same -- I'm going to instruct  
9 you not to answer -- well strike that.

10 Objection, form. Which meeting?

11 To the extent that Ms. Wivell is referring to a  
12 meeting with counsel, I'm going to instruct you not  
13 to answer about communications in that meeting.

14 A. I -- I -- I don't recall any discussions on  
15 this -- this -- this point, this project area.

16 Q. Now Exhibit 324 talks -- or has a little  
17 synopsis at the back; right?

18 A. Yes.

19 Q. Okay. And isn't it true that this brief format,  
20 this synopsis format, was specifically chosen because  
21 it would reduce the potential for Brown & Williamson  
22 to receive -- to receive information from associated  
23 companies which would be helpful to plaintiffs'  
24 lawyers?

25 MS. FOX: Objection, form.

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1 A. I'm not sure I know how to answer your question,  
2 because these are -- these are synopses that identify  
3 kind of the work area or objectives. I -- I don't  
4 know that this represents what was expected in terms  
5 of -- of month -- or not monthly, pardon me, but  
6 six-monthly updates. This is titled "PROJECTS TO BE  
7 MONITORED," so these are not -- I -- I don't know if  
8 these represent at all what would be expected on a  
9 six-monthly basis. But as I said, we would still get  
10 yearly total updates as well.

11 Q. All right. Just -- just so we're clear here,  
12 the little synopsis at the back you would get on --  
13 once every six months?

14 MS. FOX: Objection, mischaracterizes.

15 A. As I said, these appear to me --  
16 The best I can do, when I -- when I see at the  
17 top of the page, and actually it's not at the top of  
18 all the pages, "PROJECTS TO BE MONITORED," but at any  
19 rate, when I read a sampling of these, they sound  
20 like descriptions of the --

21 Q. They're descriptions of ongoing projects?

22 MS. FOX: Objection. I don't think the  
23 witness finished answering the question before you  
24 interrupted him. Did you finish your prior answer,  
25 Mr. Kohnhorst?

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1 THE WITNESS: No, I didn't.

2 A. But what I was trying to say was that these  
3 appeared more to me to be a -- a statement of the --  
4 or description of the work area, what is planned to  
5 be done, some broad description of the area of  
6 interest, the objectives. These don't appear to me  
7 to be updates, and I don't know what that detailed  
8 update would look like on the six-monthly basis that  
9 was planned.

10 Q. All right. But isn't it true that this brief  
11 reporting format was chosen because, at least --  
12 strike that.

13 Sir, isn't it true that at least one reason that  
14 this brief reporting format was chosen because -- was  
15 because it would help prevent information from  
16 falling into the hands of plaintiffs' lawyers?

17 A. That was -- that was absolutely not the -- the  
18 objective or intention. What was the objective or  
19 attention -- intention was to provide an ongoing  
20 update, which hadn't existed in -- in the past. In  
21 the past most of the reports and exchanges would be  
22 on a less-frequent basis, on a -- on a  
23 significant-report basis. Now we have a very  
24 different structure than we worked in the past, so  
25 we've got several levels of communications.

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1 Six-month update, brief, yes, because it's interim  
2 work, it's not completed, it's not final, so it just  
3 requires an update in terms of progress to date, so  
4 if people seeing that have some particular interest  
5 in -- in a brief area, they would contact the  
6 scientists and -- and discuss the results.

7 Q. Sir, could you find reference to Project 430. I  
8 think it's on page 352.

9 A. And 356 as well.

10 Q. Oh. Let's -- let's look at the longer  
11 description on page 356. Do you see it there, sir?

12 A. Yes, I do.

13 Q. And Project 430 or proposed Project 430 was  
14 titled "NEW/NOVEL PRODUCTS: FILTER: AEROSOL TESTING  
15 (SPECIAL CIGARETTE DEVELOPMENTS);" right?

16 A. Yes.

17 Q. And sir, isn't it a fact that it was determined  
18 that this project could be used by plaintiffs'  
19 lawyers?

20 MS. FOX: Objection, form.

21 A. I don't -- I don't have any way of -- of knowing  
22 what plaintiffs' lawyers might use. This -- this  
23 work area obviously goes forward, to the best of my  
24 knowledge, and if it did go forward, it would be  
25 reported out on the -- on the annual basis. And if

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1 there was something significant that came out of this  
2 work, you know, it -- it -- it might be reported out  
3 in -- in a large summary document.

4 Q. Sir, isn't it a fact that this format was  
5 chosen, at least in part, because it would allow RD&E  
6 to begin receiving documents, and that the synopsis  
7 could be reviewed and then a determination made  
8 whether or not the actual receipt of the report  
9 should be stopped?

10 MS. FOX: Objection, form, vague. Which  
11 format?

12 Q. All right, let me rephrase the question.

13 Sir, isn't it a fact that this synopsis format  
14 that we've been looking at -- that we just looked at  
15 with regard to Project 430 was chosen, at least in  
16 part, because Brown & Williamson could -- Brown &  
17 Williamson could review the synopsis and then inform  
18 B.A.T. not to send any more information about the  
19 project?

20 A. That wasn't the intention. As far as I know,  
21 the -- the documents that were produced we generally  
22 received.

23 Q. Sir, your testimony here today, so we're clear,  
24 is that there was no intent to adopt this format,  
25 none at all --

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1 MS. FOX: Objection, mischaracterizes.

2 MS. WIVELL: I'm not done.

3 Q. Sir, isn't it your testimony that there was --  
4 strike that.

5 Just so we're clear, do I understand your  
6 testimony that there was absolutely no intention on  
7 the part of Brown & Williamson to adopt this format  
8 in order that it could review the synopsis and then  
9 inform B.A.T. not to send data to Brown & Williamson  
10 about a particular project?

11 MS. FOX: Objection, form. Which format?  
12 And mischaracterizes.

13 A. I believe we -- we put this format together, and  
14 actually it was a decision of -- of -- primarily of  
15 Alan Heard, because we were making recommendations  
16 for project updates. It's -- it's -- it's obvious to  
17 me that there were some areas of concern, and it --  
18 and by seeing updates, we certainly would have  
19 visibility at earlier stages, that if we think the  
20 work is not being characterized in an appropriate  
21 way, that is not accurately defining limitations,  
22 which is principally the problem that we run into in  
23 terms of interpretation, particularly of some of the  
24 biological testing that's going on, that we would in  
25 fact have a way of feeding back to the managers that

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1 when they report, that they would have the  
2 sensitivity or not. That seems very appropriate.  
3 Whether it was even done very often, I don't know,  
4 but it seems very appropriate, because that is a  
5 major problem with this heavy-litigation environment,  
6 at the same time of trying to pursue very actively  
7 product changes.

8 Q. So you're telling me that there was an  
9 intention, at least in part, to adopt this format so  
10 that you could prevent information from falling into  
11 the hands of plaintiffs' lawyers in what you referred  
12 to as a heavy-litigation environment; right?

13 MS. FOX: Objection, form, vague. What  
14 format? And mischaracterizes prior testimony.

15 A. I would agree that it -- it -- it certainly can  
16 serve -- I don't believe it was the purpose -- to  
17 make sure that whatever is reported out and whatever  
18 is used in subsequent litigation is as unambiguous as  
19 we could possibly get it.

20 MS. WIVELL: I would like the record to  
21 reflect at this time that I would like to use the  
22 document which Kendrick Wells wrote dated February  
23 17th, 1986 to impeach this witness based on  
24 statements he has made here today, and that since the  
25 document --

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1           Ms. Fox, would you provide it to me?

2           MS. FOX:   No.

3           MS. WIVELL:   Didn't think so.   So --

4           And because of the fact that this issue will  
5 have to be addressed by the special master and the  
6 court, as I mentioned this morning, we would -- we're  
7 going to keep the record of this deposition open and  
8 I am going to have to ask for some relief from the  
9 court.   But I want the document -- the Internet  
10 document, which is available, but for which you have  
11 claimed privilege, and Exhibit 324 and the witness's  
12 testimony to be before the court all at one time  
13 before we bring this matter to it.

14           MS. FOX:   Ms. -- Ms. Wivell, may I  
15 respond?   I don't have a problem with your keeping  
16 the deposition open for the court to rule on this  
17 particular issue, and if we do need to come back on  
18 this narrow issue at a later deposition, I don't have  
19 a problem with that procedure.   I do believe the  
20 February 17th document is a privileged document, the  
21 Wells document, and I think we can proceed  
22 accordingly -- we can proceed accordingly.

23           MS. WIVELL:   And we have tried to proceed.

24           Let's take a morning break.

25           THE REPORTER:   Off the record, please.

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1 (Recess taken.)

2 BY MS. WIVELL:

3 Q. Sir, the project that's described in Exhibit 324  
4 is a project that was proposed by B&W scientists;  
5 right?

6 MS. FOX: Objection, form. What project?

7 A. What's covered in this document 324 is the -- a  
8 current status of the draft BAT Group programs.  
9 There's a lot of projects that are indicated here,  
10 but to be included in the central program, yes.

11 Q. Fair enough. And let me restate the question.

12 The program that's described in Exhibit 324 is a  
13 program proposed by Brown & Williamson scientists;  
14 right?

15 MS. FOX: Same objection.

16 A. Actually it -- it's a program that's proposed by  
17 all the -- the group R&D centers, and so it -- it's  
18 a -- it's kind of individual submissions from each,  
19 and so this is the combination of all that input.  
20 And it's a draft program at this stage.

21 Q. All right. And (coughing) Pardon me.

22 Exhibit 324 was put together in order to help  
23 establish that program; wasn't it?

24 MS. FOX: Objection, form.

25 A. This was part of the process of getting input

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1 into finally defining the -- the group program.

2 Q. And you said, I think, earlier in your testimony  
3 that this group program was part of the new  
4 reorganization plan that we have talked about earlier  
5 in this deposition; right?

6 A. I think that's accurate.

7 Q. Why -- why did you need legal department  
8 approval from Kendrick Wells for this?

9 MS. FOX: Objection, mischaracterizes.

10 A. There wasn't any approval asked for regarding  
11 the -- the work-program content from -- from the  
12 legal department, to my knowledge.

13 Q. All right. Were there contracts that had to be  
14 entered into with regard to this program?

15 A. I'm not certain. But the only contract that I  
16 think would be involved would be some arrangement  
17 once the program is completely agreed in terms of --  
18 sorry, I -- I got distracted.

19 Q. Yes, I think you did, and for that I apologize.  
20 All right. Let me ask the question again.

21 Were there contracts that had to be entered into  
22 with regard to this program?

23 A. I believe so. To the best of my knowledge,  
24 there were contracts that would relate to the  
25 cost-sharing aspects of it only. That's to the best

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1 of my recollection.

2 Q. I'm just trying to understand why you felt the  
3 need to talk to Kendrick Wells about this business  
4 program. Can you enlighten us?

5 A. Yes.

6 MS. FOX: Objection, form. But go ahead  
7 and answer the question.

8 A. Yes, I -- I believe I can, which was that the  
9 technical managers and scientists within R&D had gone  
10 through this program, the proposed program at this  
11 stage and identified work areas that they thought  
12 would be of particular interest for this  
13 more-frequent reporting that we talked about, and  
14 there was a determination being proposed here, which  
15 is contained in this document 324, to exclude some  
16 projects from this frequent update, although the  
17 total program would be reported on an annual basis.  
18 And I sought advice regarding is it appropriate to  
19 not receive everything that was being generated. Can  
20 we select, in fact, what information we want and  
21 when?

22 Q. So it is clear that you intended to select what  
23 Brown & Williamson would receive and what Brown &  
24 Williamson wouldn't receive; right?

25 MS. FOX: Objection, form.

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1 A. It was our recommendation that we would receive  
2 only part of the work program on a six-month basis.  
3 It all would be, of course, included in the annual  
4 update. So yes, there was a selection process to  
5 target what was most useful, in fact the information  
6 that likely could be used on an interim basis,  
7 because a lot of what was being recommended to be  
8 excluded were studies that would not be involving  
9 product development, which was the main thrust of  
10 B&W's work program, it would be studies that you'd  
11 really have to have a -- a more complete assessment  
12 of the -- the final work before it would be  
13 potentially actionable.

14 Q. Well sir, can you turn back to the synopsis of  
15 Exhibit -- or I'm sorry, of Project 430 on the  
16 Exhibit 324, page 356.

17 A. 430?

18 Q. Yes.

19 A. Yes.

20 Q. That's the one concerning "NEW/NOVEL PRODUCTS:  
21 FILTER: AEROSOL TESTING (SPECIAL CIGARETTE  
22 DEVELOPMENTS);" correct?

23 A. Yes.

24 Q. Now sir, that was of interest to Brown &  
25 Williamson; wasn't it?

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1 A. The general area of aerosol absolutely was.

2 Q. All right. Can you turn to the description of  
3 Project 453. On the last page of the exhibit.

4 A. Thank you.

5 Q. You see it, sir?

6 A. I do, yes.

7 Q. And there is referenced a "SMOKER  
8 REACTION/BEHAVIOUR: PRODUCT TESTING: THE INFLUENCE  
9 OF NICOTINE WITHIN THE SMOKER;" right?

10 A. Yes. That's the title of this area.

11 Q. And sir, that was information that was of  
12 interest to Brown & Williamson; wasn't it?

13 MS. FOX: Objection, form.

14 A. It was certainly not of any interest as it  
15 relates to product development. All of our product-  
16 development activities were based on developing our  
17 products on a -- a taste basis and using consumers  
18 to -- to help guide that process, and the -- while  
19 there's a lot of work being done in other areas on --  
20 on smoking reactions and behaviors, it's not a -- an  
21 area of work that is really applicable in terms of  
22 how we design products.

23 Q. Sir, are you testifying that Brown & Williamson  
24 was not interested in the pharmacological effect of  
25 nicotine on the smoker?

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1 A. From a --

2 No, I'm not. From a product-development point,  
3 though, that -- that is not a factor that goes into  
4 product design. We're basically just blending  
5 different kinds of tobaccos, looking at alternative  
6 processes and -- and looking for the -- the consumer  
7 reaction to -- to various design models, obviously  
8 being guided by marketing in terms of what tar  
9 deliveries the -- the products should be designed  
10 to -- to meet.

11 Q. And it's your testimony that Brown & Williamson  
12 was not involved in any product development at the  
13 time that this memo was written in 1986 concerning  
14 the pharmacological effects -- or that would concern  
15 the pharmacological effects of nicotine on the  
16 smoker?

17 A. Could I hear the question again?

18 Q. Certainly.

19 Is it your testimony that Brown & Williamson was  
20 not involved in any product development at the time  
21 this memo was written that concerned the  
22 pharmacological effects of nicotine on the smoker?

23 MS. FOX: Objection, form.

24 A. It was certainly not a -- a design basis for any  
25 products that we were --

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1           It's not the approach that we used, ever, in  
2 terms of designing products. The -- it's hard to  
3 remember that question exactly, but the  
4 pharmacological effects, you know, we are certainly  
5 aware of and we have people that follow the research  
6 and particularly what's done on the outside, and --  
7 and of course the -- the understanding of  
8 pharmacological effects of nicotine by this stage  
9 are -- are fast and -- and broad.

10          But yes, to the best of my recollection, we  
11 weren't involved in something I would characterize as  
12 designing a product for the pharmacological effects.

13 Q.   Well sir, weren't you involved in a cigarette --  
14 or strike that.

15          Weren't you involved in a project called Favor,  
16 F-a-v-o-r?

17 A.   Favor. My memory, to make sure I'm -- I'm  
18 correct, is -- is that the product that -- advanced  
19 by the tobacco products put out in Texas?

20 Q.   Yes, sir.

21 A.   So the question is were we involved in that?

22 Q.   Yes, sir.

23 A.   We -- we certainly weren't involved in the, it's  
24 my knowledge, the design or development or marketing  
25 of that product, unless I'm mistaken.

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1 Q. All right. Well we'll come back to that later.

2 Sir, could you turn your attention to the  
3 description of Project 487 on page 357. Do you have  
4 it?

5 A. Yes, I do.

6 Q. And that is entitled "SMOKE CONTROL: SIDESTREAM  
7 REDUCTION: VISIBILITY." Right?

8 A. Yes.

9 Q. All right. Is it your testimony that that --  
10 that project was not of interest to Brown &  
11 Williamson?

12 A. No, it's not my testimony.

13 Q. All right. That project was of interest to  
14 Brown & Williamson; wasn't it?

15 A. We were doing work on and off over the years,  
16 and I couldn't tell you how it started and stopped,  
17 in fact it's probably fairly continuous, evaluating  
18 products for sidestream reduction. At that point we  
19 may or may not have had something that was active.  
20 But what was --

21 So what was being suggested here was that the  
22 six-month update was not needed on this sidestream  
23 visibility.

24 Q. Now sir, after the meeting that -- I'm sorry.  
25 Strike that.

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1           Isn't it true that you asked Kendrick Wells to  
2 meet with yourself, Mr. Esterle and Mr. Gordon to  
3 discuss whether Brown & Williamson should receive  
4 reports from certain projects to be done at labs of  
5 affiliated companies?

6 A.    Could you read it again?

7           MS. FOX: I'm --

8 A.    Could you read it again? Are we referring --  
9 referring to this -- this particular work area  
10 (referring to Exhibit 324)?

11 Q.   Yes, sir.

12       Isn't it true that, pursuant to your request,  
13 you asked Kendrick Wells to meet with you, Dr.  
14 Esterle and Mr. Gordon to discuss whether Brown &  
15 Williamson should receive reports from certain  
16 projects to be done at labs of affiliated companies?

17 A.    I -- I definitely --

18       MS. FOX: Hang on one second. I'm going  
19 to -- I'm going to object, instruct you, Mr.  
20 Kohnhorst, that you can testify as to the general  
21 subject area of any meeting that you arranged with  
22 Mr. Wells, but as to any specifics on the areas -- on  
23 the advice given or the advice requested, I'm going  
24 to instruct you that you can't answer.

25 A.    Okay. I -- I believe the question is just

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1 regarding did I ask for a meeting and what the -- the  
2 purpose of the meeting was. As I've said earlier, I  
3 do have -- I do recall meeting with Kendrick, so I  
4 did ask for a meeting. I -- I wish I could recall  
5 who, but with this memo in front of me it seems very  
6 likely or certainly potentially likelihood that --  
7 that Dave Gordon and Dr. Esterle were invited to that  
8 meeting, although I just -- just don't recall, in  
9 fact, who was there. But they obviously were doing a  
10 lot of the work administratively, so it would make  
11 sense to me.

12 Q. And isn't it --

13 A. I -- I haven't finished.

14 Q. Oh, I'm sorry. Pardon me.

15 A. Because there was a second part of your  
16 question.

17 And -- and the purpose of the meeting was to  
18 take forward this recommendation, which this is, this  
19 document represents the -- the recommendation in  
20 terms of what projects we would like to get and what  
21 like -- projects we would not like to -- excuse me,  
22 what projects we would like to receive on the  
23 six-month update, which is 84 percent of it at this  
24 time, and the 16 percent that we don't see a need of  
25 update. And that was the purpose, was to -- to see

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1 if this was a sound recommendation that didn't have  
2 any legal implications.

3 Q. Just so we're clear here, sir, is it your  
4 testimony that the prospect of B.A.T. Company  
5 documents -- strike that.

6 Is it your testimony that at that meeting there  
7 was no discussion of BAT Group documents falling into  
8 the hands of plaintiffs' lawyers?

9 MS. FOX: I'm going to object, to the  
10 extent that this question is asking for  
11 communications between counsel, I'm going to instruct  
12 you not to answer.

13 A. I think the best I can recall and to respond to  
14 your question was my purpose was pretty -- was pretty  
15 clear in my mind, and it was here was a  
16 recommendation based on the scientists' view of what  
17 was needed more frequently and less, here was a  
18 recommendation of actually screening some level of  
19 projects that would be reviewed less -- less often  
20 than others, and so my focus was to -- to make sure  
21 this was a -- a process that was appropriate, that we  
22 could -- we in fact put in place and define exactly  
23 what we wanted and what we didn't, that that was not  
24 a problem with regards to what was received.

25 Q. Move to strike as non-responsive.

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1 Sir, my question doesn't go to your purpose.

2 A. Okay.

3 Q. My question goes to what was said, and that is,  
4 is it your testimony that the prospect of B.A.T.  
5 Company documents falling into the hands of  
6 plaintiffs' lawyers was not discussed?

7 MS. FOX: Objection, privileged. I  
8 instruct you not to answer.

9 Q. Sir, isn't it a fact that there was a discussion  
10 at that meeting about documents falling into the  
11 hands of plaintiffs' lawyers?

12 MS. FOX: Objection, privileged. I  
13 instruct you not to answer.

14 Q. Sir, you have from time to time received  
15 instructions from Brown & Williamson lawyers about  
16 what to include or exclude from documents you've  
17 created while you were at Brown & Williamson; isn't  
18 that true?

19 MS. FOX: Objection, I think the way that  
20 question is phrased, it calls for or potentially  
21 calls for attorney-client communications. I'm going  
22 to instruct you not to answer.

23 Q. Sir, isn't it true that you have been instructed  
24 from time to time while you were at Brown &  
25 Williamson to exclude certain materials -- certain

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1 information from documents you created while you were  
2 at Brown & Williamson?

3 MS. FOX: Objection, vague,. Instructed by  
4 whom?

5 MS. WIVELL: Lawyers.

6 MS. FOX: Objection. I'm going to --

7 To the extent that that is asking for  
8 communications between counsel and you, Mr.  
9 Kohnhorst, I'm going to instruct you not to answer.

10 Q. Sir, isn't it a fact that while you were at  
11 Brown & Williamson, you were told how to edit  
12 documents so that they could -- so that sensitive  
13 information would not hand -- fall into the hands of  
14 plaintiffs' lawyers?

15 MS. FOX: Told by whom?

16 MS. WIVELL: Anyone.

17 MS. FOX: I'm going to --

18 To the extent that you can answer that question  
19 based on communications that were not with counsel,  
20 you can do so, Mr. Kohnhorst. I will instruct you  
21 not to reveal communications with counsel.

22 A. I don't -- I don't think I've gotten much  
23 advice, but I have from time to time, from --  
24 certainly in the earlier days of my involvement with  
25 research and development, engineering, advice from

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1 Wally Hughes, from Bob Sanford and from Gil Esterle,  
2 principally, in terms of showing me some of the --  
3 the areas of sensitivity in terms of reporting  
4 things, ambiguities. And it heightened my awareness  
5 of -- of some of the misinterpretation and the legal  
6 implications, because I didn't come into this area  
7 with any sensitivity, knowledge or other --

8       So I have seen a lot of examples, which I may  
9 not have ever made clear, where language was very  
10 confusing, and it's primarily on the biological  
11 testing, which is an area that, when -- when results  
12 are positive, they would be re -- reported in  
13 language that could be inferred as relating to the  
14 human system when in fact the testing was in fact  
15 totally in vitro and had one level of significance,  
16 but the language would leave it very ambiguous. I  
17 mean, I think that's the best I can do in terms of  
18 the -- the advice that I've received.

19 Q.   Maybe we can clear it up for the ladies and  
20 gentlemen. Are -- are you telling us that you were  
21 told not to say -- strike that.

22       Maybe we can clear it up for the ladies and  
23 gentlemen of the jury. Are you -- you telling us  
24 that you were told not to draw inferences about the  
25 application of, for example, animal or lab studies to

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1 the human situation?

2 MS. FOX: Objection, mischaracterizes.

3 A. No. I -- I -- I didn't say that. In fact maybe  
4 I can be clearer. I mean on -- on Ames, as an  
5 example, it's a test that involves microorganisms,  
6 and the test is set up, in fact, to get positive  
7 results on a tobacco system. You can -- I don't  
8 understand all the different -- but there's lot of  
9 different Ames protocols, and some of them might even  
10 get no results from a smoke condensate.

11 So a test was designed and selected that  
12 specifically gives positive tests, so that in  
13 different prototypes of product, more burley, less  
14 burley, different ventilation, all these design  
15 changes, so you could see does that affect the  
16 activity on that Ames test.

17 Now the language is -- is very important to  
18 describe that result. If you -- if you say that it  
19 shows tar condensate to be mutagenic, that would be  
20 an accurate comment in terms of the -- the test; Ames  
21 itself is to screen for mutagenicity. It's -- it's  
22 not one that -- that shows carcinogenicity, although  
23 at one point it was believed early on that it might  
24 in fact do that.

25 So I think I've outlined -- that's the area

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1 where it's not about what is said -- sorry. It is  
2 about what is said, and it's in the -- in the right  
3 context of the reliability and what the system is  
4 being tested, and certainly the projectability into  
5 the human system is one that has to be made on -- on  
6 the sciences that I don't totally understand, which  
7 is -- is reproducible tests in multiple kinds of  
8 systems, and ultimately in a -- in an animal system.

9 Q. Move to strike as non-responsive, or move to  
10 strike the non-responsive portion of the question --  
11 of the answer after the negative response.

12 Sir, you also from time to time received  
13 instructions from lawyers to redraft documents;  
14 didn't you?

15 MS. FOX: I'm going to object and instruct  
16 you that to the extent that you received advice from  
17 lawyers, you can't answer -- I'm going to instruct  
18 you not to answer that question.

19 Q. Sir, isn't it true that from time to time you  
20 received instructions from lawyers to redraft  
21 scientific documents?

22 MS. FOX: Same objection.

23 MS. WIVELL: Are you instructing him not to  
24 answer?

25 MS. FOX: Can you answer that question

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1 without revealing any --

2 Well let me ask you this question. If -- Mr.  
3 Kohnhorst, if you can answer that question based  
4 on --

5 I'm going to instruct you not to answer for the  
6 way the question is phrased.

7 Q. Sir, isn't it true that you had to submit  
8 documents from time to time to Brown & Williamson  
9 lawyers so they could be vetted?

10 MS. FOX: I think that one you can answer.

11 A. I -- I don't --

12 I don't recall being requested by the lawyers to  
13 give them documents to be vetted. I -- I do recall  
14 asking for -- and I -- we -- we talked about an  
15 external lawyer actually to look at some of our  
16 documents that we were receiving, and -- and I am  
17 aware that -- that the lawyers review a lot of our  
18 documents, whether we produce them inside or out, and  
19 provide advice for future --

20 THE REPORTER: Just a moment, please. We  
21 have to go off the record to change tape.

22 (Discussion off the record.)

23 A. -- advice for future documents that would  
24 reflect improvements, and again, in terms of form,  
25 content, what have you. But I -- I don't believe it

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1 happened very much in terms of our internal  
2 documents.

3 Q. Sir, my question was not whether you were asked  
4 by the lawyers. Did anyone instruct you to send  
5 documents for vetting to the lawyers?

6 A. My initial impression is no, but I'm trying to  
7 think of some circumstance.

8 Q. What do you understand the word "vetting" to  
9 mean?

10 A. Well I would -- I would interpret it as a  
11 report, maybe -- maybe in a draft form, being  
12 reviewed before it could even be issued, would be the  
13 way I would interpret it.

14 Q. And so you -- you're telling us that you did  
15 understand that from time to time the lawyers did  
16 review some internal documents for vetting; right?

17 MS. FOX: Objection, mischaracterizes.

18 A. There were certainly some circumstances where  
19 the lawyers would -- would be involved with draft  
20 documents to get advice, perhaps being requested for  
21 advice, but I -- I personally don't recall being  
22 asked by anyone to -- to vet any documents.

23 Q. I --

24 And just so the record's clear, I'm not asking  
25 if you were asked to vet documents, I'm asking if

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1 you're aware of situations where Brown & Williamson  
2 lawyers vetted documents.

3 A. That's a different question than what you were  
4 asking me.

5 Q. I'm sorry. That's what I'm asking you now.

6 Just so the record's clear. Let me start again.

7 Isn't it true that from time to time Brown &  
8 Williamson's lawyers vetted scientific or technical  
9 documents?

10 MS. FOX: Objection, form.

11 MS. WIVELL: All right. Then let me  
12 restate the form. Is it --

13 MS. FOX: Well -- well I'll just tell you  
14 my problem with it, if it will help. Are you using  
15 "vetted" in the terminology Mr. Kohnhorst used?

16 MS. WIVELL: Yes.

17 MS. FOX: Okay. That's -- that's my  
18 problem with it. So if you just -- I --

19 I understand that now, and that's fine.

20 MS. WIVELL: Okay. Well let me rephrase  
21 the question.

22 Q. Isn't it true that from time to time Brown &  
23 Williamson lawyers vetted scientific or technical  
24 documents?

25 A. There were some occasions that -- whether

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1 lawyers or attorneys asked to see documents or  
2 executives asked for them to review them -- that  
3 drafts of documents would have been reviewed by the  
4 lawyers to get their input. So -- so I think --  
5 Q. So they did --

6 A. I think the answer is, on that kind of basis, it  
7 did occur.

8 Q. All right. Sir, there were times when you were  
9 instructed not to use particular documents by Brown &  
10 Williamson's lawyers; weren't there?

11 MS. FOX: Objection.

12 A. I don't know what you mean by instructed not to  
13 use documents.

14 Q. Well sir, weren't you instructed by Ernie  
15 Pepples not to use a report entitled "THE FUNDAMENTAL  
16 SIGNIFICANCE OF SMOKING IN EVERYDAY LIFE?"

17 A. If I'm clear on this, this was a point that I  
18 unfortunately confused in the record. You were  
19 showing me a document that -- that was in reference  
20 to a Rob Ferris study that was talking something  
21 about the benefits of smoking, or are we on two  
22 different topics?

23 Q. I'm sorry, sir, I'm not clear what you're  
24 talking about.

25 My question is: Weren't you instructed by Ernie

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1 Pepples not to use a report entitled "THE FUNDAMENTAL  
2 SIGNIFICANCE OF SMOKING IN EVERYDAY LIFE?"

3 MS. FOX: Objection, form, vague. And to  
4 the extent that the objection is that the -- to the  
5 extent -- well I'm going to --

6 I have an objection to the form of the question  
7 because I think it's misleading the way it's asked.  
8 I think that it's hard for me to determine whether  
9 you're asking for privileged information, advice from  
10 Mr. Pepples with respect to a particular report and  
11 the contents of that advice. If you're asking if  
12 the -- if this report was the subject matter of  
13 discussions with Mr. Pepples, I think that's all  
14 right and the witness can answer that, but if you're  
15 asking for particular advice that was given, I'm  
16 going to instruct the witness not to answer.

17 MS. WIVELL: So are you instructing him not  
18 to answer my question?

19 MS. FOX: Well I believe your question is  
20 unclear, so I'm going to instruct him not to answer  
21 the question.

22 Q. Well my question is, just so we're clear:  
23 Weren't you instructed by Ernie Pepples not to use a  
24 report entitled "THE FUNDAMENTAL SIGNIFICANCE OF  
25 SMOKING IN EVERYDAY LIFE."

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1 A. I have just a --

2 MS. FOX: Well --

3 A. I have just a -- a small amount of confusion  
4 because I'm not -- I'm not clear that I'm referring  
5 to the same or have memory of the same document  
6 you're referring me to. I do recall a time in  
7 seeking advice from Ernie Pepples on a -- a document,  
8 and I believe the -- if not the author, the person  
9 that might have been pulling this compendium together  
10 would have been Robb Ferris. And I saw that in a  
11 document that you showed me in the course of this  
12 deposition. And -- and I do recall to some extent  
13 taking that to Mr. Pepples and -- and other people  
14 for input before giving the information back -- or  
15 recommendation back on the potential use of this  
16 public affairs document. I'm just not certain we're  
17 thinking about -- I'm thinking about the document  
18 you're referring to.

19 (Plaintiffs' Exhibit 325 was marked  
20 for identification.)

21 BY MS. WIVELL:

22 Q. Sir, showing you what's been marked as  
23 Plaintiffs' Exhibit 325, it is Bates numbered  
24 105538876; correct?

25 A. Yes.

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1 Q. All right. And if you turn to page that ends  
2 with Bates number 881, you see a date of April 24th,  
3 1984?

4 A. Yes.

5 Q. And the title is "THE FUNCTIONAL SIGNIFICANCE OF  
6 SMOKING IN EVERYDAY LIFE?"

7 A. That's correct.

8 Q. And it's "REPORT NO. RD.1962 RESTRICTED;"  
9 correct?

10 A. Yes.

11 Q. "RD" means that it came out of the research and  
12 development department?

13 A. Yes. The -- the title at the top shows that  
14 it's from the Southampton R&D. Right.

15 Q. All right. And this is a restricted document?

16 A. Yes.

17 Q. And again what does "restricted" mean when we  
18 see it on a document from BATCO?

19 A. It just means that it's information that should  
20 be shared on a decision basis, meaning a conscious  
21 basis, with individuals that would need the  
22 information as opposed to just putting it in  
23 circulating files to go through all of R&D or all  
24 marketing or anybody else. So there should be a  
25 reason to distribute it further at the discretion of

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1 the -- of the people shown on distribution.

2 Q. Sir, and isn't it true that Mr. Pepples told you  
3 not to use this particular document?

4 MS. FOX: Objection, form, vague. Used for  
5 what purpose? And I instruct you not to reveal the  
6 contents of any communications or legal advice  
7 received from Mr. Pepples.

8 A. May I just take a moment to look at this  
9 document?

10 Q. Certainly, sir.

11 A. I -- I just looked at a few pages of the  
12 document.

13 I have a recollection that there was a request  
14 made at a -- at a -- an R&D conference on a topic  
15 that appears to me to be very similar if not this  
16 area, which was characterized as a -- which my memory  
17 on characterization is slightly different. That's  
18 the only reason I'm not totally sure of. My memory  
19 on characterization was "THE POTENTIAL BENEFITS OF  
20 SMOKING," and this says something slightly different,  
21 obviously, it says "THE FUNCTIONAL SIGNIFICANCE OF  
22 SMOKING IN EVERYDAY LIFE." But if -- if this is the  
23 document that -- that was -- that I'm recalling at  
24 that R&D conference, I was asked, as were the other  
25 representatives from the different R&D's, to take

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1 back the document that potentially could be used,  
2 which was being considered, for a public affairs type  
3 communication; that is, some of the benefits of  
4 smoking. And there's a -- there's a -- right in the  
5 executive summary, some of the purported benefits, I  
6 don't think by our research internally, but I'm not a  
7 hundred percent sure, but -- but at any rate,  
8 potential benefits of smoking.

9       So the question was: If there are validatable  
10 benefits of smoking, what would be our view on using  
11 this information to -- in a public affairs arena?

12 Q. Sir, and isn't it true that Ernie Pepples told  
13 you not to use in the public affairs arena this  
14 document that's entitled "THE FUNCTIONAL SIGNIFICANCE  
15 OF SMOKING IN EVERYDAY LIFE?"

16       MS. FOX: Objection. I'm going to instruct  
17 you not to answer, it calls for communications with  
18 counsel.

19 Q. Sir, isn't it true that this report urges the  
20 position that the primary motivation for smoking is  
21 ultimately tied to a pharmacological function of  
22 nicotine?

23 A. Could you refer me to that?

24 Q. Have you reviewed this report, sir?

25 A. No.

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1 Q. Do you remember it?

2 A. Just -- just very vaguely.

3 Q. And isn't it true that basically you were told  
4 not to use this document because its basic  
5 proposition was that there was a pharmacological  
6 function of nicotine?

7 MS. FOX: Objection, vague. Told by whom?

8 A. But I --

9 MS. FOX: If she's not going to clarify, to  
10 the extent that --

11 I'm going to instruct you not to reveal any  
12 communications by counsel. If you had discussions  
13 with others, that's fine, or if you have facts you  
14 wish to communicate, that's fine as well.

15 A. The -- pardon me. Could you read the question  
16 again?

17 Q. Isn't it true that basically you were told this  
18 document shouldn't be used in any public relations  
19 function because its basic position is that nicotine  
20 is pharmacologically active?

21 MS. FOX: Same objection.

22 A. Of course it is a very well-established fact  
23 that nicotine is pharmacologically active, as are a  
24 lot of other compounds, like caffeine, that we're  
25 commonly aware of. The -- the thrust of this, I

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1 think, is -- is shown pretty much in the -- the main  
2 items here, is -- is attention and vigilance, memory,  
3 stress. The thought was: Is there some public  
4 affairs advantage of doing -- of -- of -- of sharing  
5 what has already been reported, primarily in outside  
6 studies, but in -- in a more compendium form?

7 It -- it is true that I did ask for advice from  
8 legal. It is also true that I -- I discussed this,  
9 but -- I don't recall in -- in any detail, but with  
10 the public affairs professionals at that time as well  
11 at Brown & Williamson.

12 Q. Well sir, isn't it a fact that because this  
13 document urges the position that the primary  
14 motivation for smoking is the pharmacological  
15 activity of nicotine, this was a very sensitive  
16 document for Brown & Williamson, considering its  
17 legal position?

18 MS. FOX: Objection, form.

19 A. I'm sorry, one more time. I'll try to --

20 Q. Sir, isn't it a fact that because this document  
21 urges the position that the primary motivation for  
22 smoking is the pharmacological activity, there is --  
23 it was a very sensitive document for Brown &  
24 Williamson, considering the company's legal  
25 position?

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1 MS. FOX: Same objection.

2 A. I don't know of all the concerns that there may  
3 be on the legal side on this document. I -- I am  
4 aware of what I heard back from even the PR side,  
5 which is this would be viewed as a very negative  
6 thing in the environment that Brown & Williamson was  
7 in. It was very much a -- an activity that would  
8 appear to be trying to increase smoking. It may be  
9 making claims that are unsubstantiated, which  
10 would -- would be a -- a major issue, and the PR side  
11 of the business was not enthusiastic about it.

12 Q. Well sir, isn't it also true that one of the  
13 reasons you were told not to use this document for PR  
14 purposes is that under the current legal environment,  
15 claims of addiction had been lodged against Brown &  
16 Williamson?

17 MS. FOX: Objection, vague. Told by whom?

18 If she's not going to specify, Mr. Kohnhorst, I  
19 instruct you that to the extent your communications  
20 were with public affairs, you may communicate those  
21 communications; to the extent that you had  
22 communications with counsel, I instruct you not to  
23 answer on the grounds of privilege.

24 A. I -- I -- I --

25 I really don't have a recollection of -- of

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1 addiction coming up from public affairs. I don't  
2 recall any discussion on addiction at all.

3 Q. Well sir, isn't it a fact that Ernie Pepples  
4 wrote you a memo on this with regard to this  
5 document?

6 MS. FOX: Mr. Kohnhorst, you can identify  
7 whether in fact you received the memo. I think that  
8 that's fair. The contents of the memo or any legal  
9 advice I would instruct you not to answer, but the  
10 fact of whether you received the memo with respect to  
11 this document, I think that you can answer.

12 A. I -- I don't -- I don't recall getting a memo  
13 from Mr. Pepples.

14 Q. And isn't it true, sir, that Mr. Pepples told  
15 you in that memo about claims of addiction which had  
16 been lodged against Brown & Williamson in legal  
17 cases?

18 MS. FOX: Objection, instruct you not to  
19 answer, calls for the contents of attorney-client  
20 communications.

21 Q. Sir, is it your testimony that these -- these  
22 discussions that you had with public affairs didn't  
23 raise the issue of addiction at all?

24 A. I certainly don't remember it. I do remember a  
25 very little, and the main thing was it was just a --

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1 a terrible idea to position benefits of smoking in --  
2 in 1985, '86, whatever the -- the timeframe that was  
3 being considered.

4 Q. Well sir, isn't that -- isn't it true that it  
5 was a terrible idea because the issue of addiction  
6 was a particularly sensitive area for the tobacco  
7 industry?

8 A. Again, I don't have any recollection of --  
9 you've --

10 You've indicated that I've received some --  
11 something, perhaps, that talks about addiction. I  
12 don't recall it. When I look at the benefits here in  
13 terms of memory or vigilance or what have you, this  
14 is -- this has nothing to do with addiction.  
15 Boredom, et cetera. So I think that's why I  
16 remember. These -- these are the benefits that are  
17 purported. There -- there may be some issues in this  
18 document, but in terms of what I recall, this was  
19 dealt with primarily on -- on a very poor idea from a  
20 public affairs point of view. And it wasn't coming  
21 from Brown & Williamson, at any rate, this idea.

22 Q. Sir, isn't it -- strike that.

23 Are you telling the ladies and gentlemen of the  
24 jury that you have absolutely no recollection of any  
25 discussion of addiction with relation to this

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1 document at all?

2 MS. FOX: Objection, form. To the extent  
3 that this question is referring to communications  
4 with public affairs, you may answer that question.  
5 To the extent that the question is communicating --  
6 asking about communications with counsel, I would  
7 instruct you not to answer.

8 A. I -- I've --

9 I absolutely don't remember any discussions  
10 about addiction, or, if -- if it came up, I don't  
11 recall it. What I do recall was being given a huge  
12 volume, which sounds to me as a bad idea to start  
13 with. I faithfully brought it back. I didn't -- I  
14 don't believe even at the time I took the effort to  
15 go through this because, as it was presented to me,  
16 it was a public affairs idea, and having spent now a  
17 good number of years in the U.S. market, I didn't  
18 think this had -- this --

19 This was a non-starter idea, even though  
20 operating companies in other environments thought it  
21 was potentially a good idea.

22 Q. Sir, isn't it a fact that addiction was raised  
23 with you con -- strike that.

24 Sir, isn't it a fact that Mr. Pepples did raise  
25 the general subject matter of addiction with you when

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1 he wrote to you about this document?

2 MS. FOX: Objection. I believe that, while  
3 you tried to frame that question with respect to the  
4 general subject matter, you haven't done so. I  
5 believe it's calling for communication of legal  
6 advice, and I would instruct you not to answer, Mr.  
7 Kohnhorst.

8 Q. Sir, did you talk to Mr. Pepples to obtain legal  
9 advice about the use of the document, or did you talk  
10 to Mr. Pepples -- well let's start there.

11 Did you talk to Mr. Pepples to obtain legal  
12 advice about the use of the document?

13 MS. FOX: Objection, vague. Use for what  
14 purpose?

15 You can answer the question.

16 A. I believe, you know, in 1984 these -- these  
17 issues were very new to me, so I was -- I thought  
18 that this needed to have both a -- a public affairs  
19 opinion and a legal opinion, and if -- if the process  
20 was, in my view, that it's a good idea, I would have  
21 carried it forward to call the significance of this  
22 to Dr. Hughes. So I think I was looking for a legal  
23 opinion.

24 Q. I'm not understanding. Were there contracts  
25 that needed to be let regarding the use of this?

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1 MS. FOX: Objection, argumentative.

2 A. I think I've -- I've raised an issue that I  
3 would -- would see in terms of the public affairs  
4 document. It -- it definitely has to be reviewed by  
5 legal, it has to be factual, supportable, can't put  
6 claims out that are -- that are claims of -- of  
7 health claims. So I think there are a lot of legal  
8 issues that are always in public communications,  
9 whether it's public affairs or marketing.

10 Q. Well I'm asking, I guess, a little bit different  
11 question.

12 You asked public affairs to get their opinion  
13 about whether this would be good for Brown &  
14 Williamson's business; right, to use this document?

15 A. Yes. Is this an idea that might be helpful in  
16 terms of Brown & Williamson's business?

17 Q. Okay. And did you ask Mr. Pepples whether using  
18 this document would be a good idea for Brown &  
19 Williamson's business?

20 MS. FOX: Objection. To the extent that  
21 you're asking Mr. Pepples for legal advice and  
22 whether -- and you were seeking legal advice with  
23 respect to the effect of this document, I instruct  
24 you not to answer. And I object to the form of the  
25 question as vague and ambiguous.

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1 A. I -- I believe I was, you know, it's -- it's  
2 many years ago, but I -- at that time I think I was  
3 asking probably multiple questions. Do you think  
4 it's good for the business? Are there legal  
5 implications?

6 Q. Okay. But you didn't ask the PR department for  
7 legal advice; did you?

8 A. No. I wouldn't.

9 Q. Okay. And you asked the same question of Mr.  
10 Pepples that you asked of the PR department; didn't  
11 you, and that is: Is this a good document to use in  
12 Brown & Williamson's business? Right?

13 MS. FOX: Objection, I'm going to instruct  
14 you not to answer as to communications with counsel.

15 MS. WIVELL: I'm not asking for legal  
16 advice, I'm just asking whether this was business  
17 advice, sir.

18 MS. FOX: Well then rephrase the question,  
19 because it's vague right now.

20 Q. Sir, you asked the very same question of Mr.  
21 Pepples that you asked of the PR department; right?

22 MS. FOX: Objection, assumes facts.

23 A. I obviously don't recall exactly how he framed  
24 it, you know, the questions either. If there's a --  
25 I don't know if I even wrote a request for them to

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1 consider it. I don't recall it. But what I've been  
2 asking PR is very clear, which is: Is this a good  
3 idea?

4 You know, I already had a view: This is not a  
5 good idea.

6 Q. Okay. And it would be fair to say, wouldn't it,  
7 that you asked the same question of Mr. Pepples, and  
8 that is: Is this a good idea for Brown &  
9 Williamson's business to use this document publicly?

10 MS. FOX: Objection, mischaracterizes.

11 A. I think when I would -- when I've gone to the --  
12 to the lawyers, it would -- would be a different  
13 question. I think the analogue is very easy to  
14 understand, which is if I were in marketing and I  
15 went to a marketing group, I would say this is a good  
16 idea. If I take that idea to legal, you're not  
17 asking him is it a good marketing plan, will it sell  
18 product, you're asking Can we support this? Is it --  
19 Are we making claims we can't support? Is there a  
20 copy? Is there any infringement in terms of  
21 regulations on -- on models? Et cetera. So I think  
22 they are -- they are different questions.

23 Q. Okay.

24 A. They -- they may have some overlap.

25 Q. But you --

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1           Correct me if I'm wrong here. You asked Mr.  
2 Pepples whether it was advisable to use that  
3 document.

4           MS. FOX: Objection, asked and answered.  
5 Well, objection, privileged. To the extent that you  
6 were seeking legal advice from Mr. Pepples, I  
7 instruct you not to answer. I think the question is  
8 vague.

9 A. Sorry, I think I've explained myself totally, so  
10 I need to hear your question again.

11 Q. Okay. And what you were asking Mr. Pepples was  
12 is it appropriate for us to use this in a public  
13 relations way; is that right?

14 A. I think I was asking for any legal advice he  
15 would have if, from the public relations point of  
16 view, we -- we would go forward with some program.  
17 That doesn't mean that I don't -- that we'd give this  
18 document out, but some program to try to pull  
19 together in some way a compendium of the benefits of  
20 smoking that have been identified in research outside  
21 the company, well-known in many cases, but kind of  
22 scattered about. So I think I was asking for a  
23 complete view on the legal implications of such a --  
24 a potential PR.

25 Q. Okay.

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1 A. Which was a bad idea, from my perspective, from  
2 the word go, as I said.

3 Q. But you were not asking about using this  
4 document in a lawsuit; were you?

5 A. "Using this document in a lawsuit." No, I'm  
6 sure that was not the case.

7 Q. All right. And -- and as a matter of fact,  
8 Exhibit 324, which we've spent time on this morning,  
9 that had nothing to do with a particular lawsuit; did  
10 it?

11 A. 324?

12 Q. Yes. It's the one about the February 17th  
13 meeting.

14 A. No, it didn't have anything to do with a  
15 particular lawsuit.

16 Q. All right. And the discussions you had with Mr.  
17 Wells with regard to the meetings that we've talked  
18 about this morning concerning Exhibit 324, that had  
19 nothing to do with a particular lawsuit; did it?

20 MS. FOX: Objection, vague.

21 A. I don't -- I don't believe I've had any  
22 discussions that I can recall up until this  
23 deposition on -- on documents as it relates to -- to  
24 lawsuits.

25 MS. WIVELL: All right. Why don't we take

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1 our lunch break.

2 THE REPORTER: Off the record, please.

3 MS. FOX: Can we just go back on?

4 THE REPORTER: We're on.

5 MS. FOX: I've had a list of the documents  
6 that I may use on direct prepared. I'd like to have  
7 it typed up and given to you after lunch, if that's  
8 all right with you. And I'd like to, at least at  
9 this moment, provide you with a copy of the one  
10 document which is in the Minnesota depository, but  
11 what I'm unclear about is whether it's a document  
12 you've selected in your review process yet. So I'd  
13 like to provide you with a copy of that document,  
14 which is Bates numbered 107468105 through 107468110,  
15 "Program Review G.R. & D.C. Southampton," and I'll  
16 hand you that.

17 I'd be happy to give you this handwritten list,  
18 too, if that's acceptable.

19 MS. WIVELL: That's fine, I don't need a  
20 typed list. What I need, I guess, because I'm  
21 getting this at such late -- I would like copies of  
22 the documents that are on the list that you want to  
23 have typed up or that you've handwritten. So I would  
24 appreciate receiving those this afternoon, too.

25 MS. FOX: Okay.

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1 MS. WIVELL: That way I can assure myself  
2 that I have them.

3 MS. FOX: That's fine, Marti.

4 MS. WIVELL: Okay. Thank you.

5 THE WITNESS: Could --

6 MS. FOX: Do you need to say this on the  
7 record, or is it something we can say when we go off  
8 the record?

9 THE WITNESS: I -- my last statement is in  
10 error.

11 MS. FOX: Oh. Do you mind if we have --

12 MS. WIVELL: Not at all.

13 MS. FOX: We'll just do that one  
14 correction, and --

15 A. I -- I believe the last statement I -- I made  
16 was I haven't reviewed any documents that were  
17 involved in any -- any lawsuits, and my frame of  
18 reference was smoking-and-health-type litigation. I  
19 obviously have been involved in a commercial  
20 litigation on a patent, and I obviously reviewed a  
21 lot of documents, so -- for -- for that patent.

22 Q. And the suit that you're referring to is the  
23 patent-infringement lawsuit brought by Philip Morris?

24 A. Brought by Brown & Williamson.

25 Q. Oh, I'm sorry. Against Philip Morris?

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1 A. Yes.

2 Q. All right. And that does not involve  
3 smoking-and-health-related issues; does it, sir?

4 A. That's correct.

5 MS. WIVELL: Why don't we take our lunch  
6 break.

7 THE REPORTER: Off the record, please.

8 (Luncheon recess taken at 12:06 o'clock  
9 p.m.)

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1 AFTERNOON SESSION

2 (Deposition reconvened at 1:33 o'clock  
3 p.m.)

4 MS. WIVELL: At this time I would ask that  
5 the defense provide us with the memo that Mr. Pepples  
6 wrote to Mr. Kohnhorst dated 8-16-84 so that I could  
7 use it to examine the witness.

8 MS. FOX: This is a privileged document,  
9 and no, we will not provide it.

10 BY MS. WIVELL:

11 Q. Sir, isn't it true that at the time period that  
12 Exhibit 325 was written in the early '80s, it was a  
13 concern to the tobacco industry that -- strike that.

14 Isn't it true that addiction was a particularly  
15 sensitive area for the tobacco industry at the time  
16 that Exhibit 325 was written?

17 A. I think I'm -- I'm not clear on when addiction  
18 became a significant issue, but I would think during  
19 these years the allegations, the definitions, the  
20 understandings of addictions were -- were -- were a  
21 point of issue.

22 Q. And sir, you would agree that addiction is a  
23 very sensitive issue for the tobacco industry;  
24 wouldn't you?

25 MS. FOX: Objection, asked and answered.

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1 A. I think, among a lot of other things, addiction  
2 would be one of the areas that would be a sensitive  
3 issue.

4 Q. And the reason for that is that if a person is  
5 addicted --

6 (Knock on door.)

7 MS. WIVELL: Strike that.

8 Q. And the reason for that is because if a person  
9 is addicted to something, they really don't have a  
10 free choice about whether or not to use the product;  
11 right?

12 MS. FOX: Objection, form.

13 A. I think addiction really needs to be defined.  
14 Choice or not is -- I think is a separate issue,  
15 depending on what your -- what your definition of  
16 addiction is.

17 Q. Well sir, isn't it true that if it were thought  
18 that the tobacco companies were perpetuating the  
19 smoking habit in people, that it could not be argued  
20 people were making a free choice in choosing to  
21 smoke?

22 MS. FOX: Objection, form.

23 A. Could you reread that, please?

24 Q. Certainly.

25 Isn't it true that if it were thought that the

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1 tobacco companies were perpetuating the smoking habit  
2 in people, that it could not be argued that people  
3 were making a free choice in choosing to smoke?

4 A. It's a complicated question the way it's  
5 phrased, but I think people may think that. That  
6 doesn't, in my view, make it final whether people  
7 choose to use the product or not.

8 Q. Well sir, you would agree that it was a concern  
9 to the tobacco industry in the early '80s that if it  
10 were thought they were perpetuating smoking, that  
11 they couldn't argue in court cases any more that  
12 cigarette smoking was a free choice.

13 A. Well I think a lot of people may have that  
14 view. Some people have expressed those types of  
15 views.

16 I think -- I think people do have a free  
17 choice. Obviously, whatever the opinions of people  
18 are are going to differ.

19 Q. Move to strike as non-responsive.

20 I'm not talking about your opinion about whether  
21 people have a free choice here, sir. Was it a  
22 concern to the tobacco industry in the early '80s  
23 that if it were thought they were perpetuating  
24 smoking, they couldn't argue in court cases any more  
25 that cigarette smoking was a free choice?

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1 MS. FOX: Objection, form.

2 A. It obviously is a concern of what people think  
3 about the product. I don't think that gives away the  
4 ability to argue on reasonable grounds what the  
5 reality is regarding choosing to smoke cigarettes.

6 Q. Move to strike as non-responsive.

7 Sir, my question is: Wasn't it a concern within  
8 the industry that if it were thought that cigarettes  
9 contained substances which perpetuated smoking, that  
10 the tobacco companies couldn't argue in court any  
11 more that cigarette smoking was a free choice?

12 MS. FOX: Objection, asked and answered,  
13 and form.

14 A. It's very difficult to -- to understand what I'm  
15 not answering in your question already. But yes,  
16 there was a concern about what was defined as  
17 addiction and what people believed is addiction.  
18 It's certainly a concern in terms of legal  
19 interpretation of those definitions. And -- and I  
20 assume you could --

21 What you're doing is putting some hypothesis  
22 forward that -- that would make it difficult to argue  
23 the addiction arguments in -- in court. If you're  
24 asking for a legal view, I really don't have it.

25 Q. Well sir, I'm asking you: Wasn't that subject

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1 discussed among tobacco company employees, that if it  
2 were admitted that tobacco perpetuated the smoking  
3 habit, that the companies couldn't assert the defense  
4 of free choice in court cases any more?

5 MS. FOX: Objection, vague and ambiguous.

6 A. If it were discussed among employees --

7 I mean the issue of addiction is and was  
8 discussed among the tobacco industry,  
9 unquestionably. I don't think that's giving up the  
10 right to assert what we -- what the beliefs are based  
11 on established foundations about addiction.

12 Q. Sir, you've seen documents that essentially say  
13 something to the effect of the role of nicotine in  
14 perpetuating the smoking habit was a particularly  
15 sensitive one because if it were shown that nicotine  
16 was perpetuating the smoking habit, the industry  
17 could well end up having to eliminate nicotine.

18 A. I'm -- I'm trying to recall a document that  
19 talks about the industry eliminating nicotine. I  
20 don't recall any.

21 Q. All right. Sir, isn't it true that B.A.T.  
22 scientists talked about precisely that, --

23 MR. PANAGROSSI: Objection.

24 Q. -- that if nicotine were thought to perpetuating  
25 the smoking habit, that the tobacco industry were

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1 called -- might be called upon to reduce or eliminate  
2 nicotine from the product?

3 MS. FOX: Objection, form.

4 A. I -- I am aware of concerns about the  
5 possibility of regulatory impact on reducing and/or  
6 eliminating nicotine from -- from the product.  
7 That's in fact a position that, if I'm not mistaken,  
8 that the FDA has -- has indicated at times in the  
9 past. I'm also aware of other government agencies in  
10 other countries that have put restrictions on the  
11 product. So those are -- those are reasonable things  
12 to be talked about within the companies.

13 Q. And sir, you're referring to the fact that it  
14 was known that if the tobacco industry admitted that  
15 cigarette smoking was addictive, the FDA could  
16 regulate cigarettes; right?

17 MS. FOX: Objection, form.

18 A. I'm -- I'm really not an expert on what it --  
19 what the regulatory requirements are for the FDA to  
20 regulate cigarettes. I think -- I think it is our  
21 belief that, you know, that -- that addiction is --

22 It's not a belief. I think it's clear that  
23 addiction is a -- a definitional issue, and there is  
24 a tremendous amount of ambiguity, but I really can't  
25 comment on the regulatory powers or authorities of

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1 the FDA.

2 Q. But sir, you heard it discussed, I think you  
3 said, that if it were admitted that nicotine  
4 perpetuated the smoking habit, it might subject the  
5 cigarette industry to FDA regulation; right?

6 MS. FOX: Objection, mischaracterizes.

7 A. I -- I don't believe I indicated that.

8 Q. Sir, you told us, and I quote, "I am aware of  
9 concerns about the possibility of regulatory impact  
10 on reducing and/or eliminating nicotine from the  
11 product." Correct?

12 A. I -- that doesn't sound like the whole thought.  
13 That sounds like part of it.

14 Q. That's part of it, though; right?

15 A. Yes.

16 Q. And you were aware of discussions that took  
17 place within the industry about that concern; weren't  
18 you?

19 MS. FOX: Objection, form.

20 A. I do -- I do recall reading in the -- in the  
21 newspapers and the reports about, you know, potential  
22 FDA assumption of regulatory authority and some of  
23 their -- some of their proposals or potential  
24 proposals in terms of that if they had regulatory  
25 rights, and yes, I'm -- I'm sure I was involved with

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1 discussions regarding the -- the implication of that.

2 Q. And discussions that you held as an employee  
3 with other employees of tobacco companies; right?

4 MS. FOX: Objection, form, vague.

5 A. I --

6 For the most part my recollection was in -- in  
7 discussions with employees at -- at Brown &  
8 Williamson on this issue.

9 Q. You also discussed it with BATCO employees;  
10 didn't you, sir?

11 A. I'm trying to remember a specific incidence.

12 I'm -- I'm -- I'm sure, because I'm aware that we --  
13 we shared information regarding what the environment  
14 was like commercially wherever we operated in  
15 different countries, and -- and regulatory  
16 environment description would have -- you know, in  
17 broad terms, would have been part of that. But I  
18 can't recall a specific discussion.

19 Q. Sir, are you familiar with a group within the  
20 BAT Group called the tobacco research directors?

21 A. "Tobacco research directors." Unless we're  
22 referring to the -- the same group that we have been  
23 many times with regards to the R&D heads as part of  
24 the group research program and R&D coordination, I --  
25 right now it doesn't --

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1           If that's a different group, I'm not sure I'm  
2   aware of it.

3   Q.    Okay.  Have you ever seen Dr. Blackman's notes  
4   of a meeting with the tobacco research directors from  
5   1983 in which he articulated a concern that if the  
6   role of nicotine in perpetuating smoke -- I'm sorry.  
7   Strike that.

8           Have you ever seen Dr. Blackman's notes of a  
9   meeting of the tobacco research directors from 1983  
10   where he talked about a concern that if it were shown  
11   that nicotine was associated with perpetuating the  
12   smoking habit, the industry could well be called upon  
13   to reduce or eliminate nicotine from the product?

14           MS. FOX:  Objection, form.

15   A.    I -- I remember reviewing previously the trip  
16   report from Dr. Blackman, but that doesn't sound like  
17   what you're referring to.  Right now I don't recall  
18   that.  I may have seen it though.

19   Q.    Well sir, isn't it true that the tobacco  
20   industry may be thought of as a specialized portion  
21   of the pharmaceutical industry?

22           MS. FOX:  Objection, foundation.

23   A.    I don't think that's a fair characterization.  I  
24   think the pharmaceutical industry is very much in the  
25   business of developing and marketing, producing drugs

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1 for medicinal or pharmaceutical uses, which is very,  
2 very different from tobacco, like several other  
3 consumer goods, alcohol, some caffeinated products,  
4 colas, coffee, that -- that -- that do have  
5 pharmacological effects but definitely are not  
6 marketed as drugs.

7 Q. Well sir, isn't nicotine a potent drug with a  
8 variety of physiological effects?

9 A. I don't know the definitional -- if there is a  
10 pharmacological definition for potent drugs.

11 Nicotine is a drug, as are many other substances.

12 Q. And sir, isn't the business of the tobacco  
13 industry nicotine?

14 MS. FOX: Objection, form.

15 A. The business of the tobacco industry is -- is  
16 selling tobacco products, which it contains nicotine,  
17 and while nicotine has pharmacological properties,  
18 it's -- it's not marketed as a drug. It -- so I  
19 think it's the whole product that is being sold and  
20 it's not just nicotine.

21 Q. Sir, the pack of cigarettes that we've had  
22 marked, do you have it there? That's Exhibit 310?

23 A. 309.

24 Q. 309.

25 A. Yes.

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1 Q. Does that anyplace tell the consumer that  
2 nicotine is addictive?

3 A. This -- this product has a health warning that  
4 we've disclosed before. It says nothing about  
5 nicotine. And the health warnings, of course, are  
6 required by the Surgeon General, as we know.

7 Q. Well I understand that, sir. My question is  
8 different.

9 A. Yes.

10 Q. My question is: Does this Exhibit 309, this  
11 pack of cigarettes, say anything about cigarette  
12 smoking being addictive?

13 A. No, this one doesn't.

14 Q. Now there's nothing that prevents Brown &  
15 Williamson from putting "Cigarette Smoking Is  
16 Addictive," that statement, on that pack of  
17 cigarettes; is there, sir?

18 A. I'm -- I'm not certain about the legal  
19 requirements for us to make any claims about the  
20 product. It -- it perhaps is possible for us to do  
21 that on an elective basis. It certainly -- and we're  
22 required to, in some countries of the world, to have  
23 a -- a comment regarding addiction. I can't recall  
24 those right off. But that sounds -- that sounds --  
25 I have a recollection that there may be some

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1 countries that -- that have a warning regarding  
2 addiction.

3 Q. What countries are those, sir?

4 A. That's what I said, I -- I don't recall.

5 Q. But you do under --

6 But you do recall that there are some.

7 A. I -- I believe there -- there are, and I also  
8 believe that if the Surgeon General required it, it  
9 would be on this pack as well.

10 Q. All right. But are you telling us that Brown &  
11 Williamson won't put it on there until the Surgeon  
12 General requires it?

13 A. I think that's -- that's an accurate statement,  
14 because I -- I don't believe, depending on what  
15 definition you use, and it is a definitional term,  
16 that -- that -- whether it's addictive or not.

17 Q. Sir, you understand that Liggett is preparing to  
18 put such a phrase, "Cigarette Smoking Is Addictive,"  
19 on its cigarette packages; right?

20 A. I'm not totally familiar, but I -- I believe  
21 I've heard there's some concession like that. I'm  
22 not sure exactly the agreement.

23 Q. All right. And you understand that the Surgeon  
24 General has not, as of yet, required that; right?

25 A. That's my understanding, yes.

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1 Q. And -- and just so the ladies and gentlemen  
2 understand, the FDA has attempted to assert authority  
3 over cigarettes in this year of 1997 based on their  
4 belief that nicotine has a pharmacological effect on  
5 the body; correct?

6 A. I'm -- I'm not certain of the reason for their  
7 assertion, but obviously nicotine does have a  
8 pharmacological effect, as do a lot of other  
9 substances. But I don't think that's the -- the key  
10 issue for jurisdiction, but I'm not certain. I think  
11 that's a -- really according to law that Congress  
12 makes in terms of giving these agencies their --  
13 their power.

14 Q. And you understand that Brown & Williamson and  
15 the other defendants in this case went to court in  
16 North Carolina to try and prevent the FDA from  
17 asserting control over cigarettes; right?

18 A. Yes, I'm aware of that.

19 Q. And you understand that the court found in favor  
20 of the Food and Drug Administration on most of the  
21 issues before it; isn't that true?

22 MS. FOX: Objection, form.

23 A. I'm -- I'm not sure what has been found so far.  
24 I don't know that there's any substance --  
25 substantive issues one way or the other that have

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1 been determined. But there may be some rulings. I'm  
2 unaware of the nature of them.

3 (Discussion off the stenographic record.)

4 Q. Now sir, isn't it a fact that cigarette smoking  
5 is addictive?

6 MS. FOX: Objection, form, vague.

7 A. That's a question of me?

8 Q. Yes, sir.

9 A. It's a very --

10 It's a very tough question to answer because it  
11 really requires a good platform of definition to  
12 determine it, and, I guess, a good understanding of  
13 the actions of -- of nicotine in the body. I'm not  
14 an expert, but I have tried to make myself reasonably  
15 knowledgeable about it.

16 In -- in the Surgeon General's report in 1964,  
17 just looking at definitions, there was a -- a  
18 clinical definition that was adopted. I think it  
19 was -- was developed or at least proposed or -- in  
20 part by the World Health Organization. It was a very  
21 clinical definition, and I don't recall it all, but  
22 it was that, you know, to be addictive, a chemical, I  
23 guess if we refer to, would have to produce  
24 intoxication, the drug would show tolerance, meaning  
25 you would require more and more, that there would be

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1 withdrawal, and I -- and I don't know, other -- other  
2 criteria as well I don't recall right now. And the  
3 Surgeon General and his council viewed nicotine, or  
4 at least cigarettes, as -- as being habitual, as, if  
5 I recall right -- or perhaps habituating or  
6 certainly -- or habit-forming, I can't recall the  
7 words precisely, but not addictive, to separate it  
8 from the significant different properties of other  
9 hard drugs which included a lot of illegal substances  
10 as well as legal substances that would be prescribed,  
11 alcohol as well. So there was a definition at one  
12 point of time, and the -- the authorities working on  
13 that definition didn't think that nicotine or  
14 cigarettes were -- on that basis were addictive.

15 Now that -- that time has moved on and the  
16 definition has changed. It's -- it's -- the  
17 definition, and I don't recall the years, it's -- but  
18 it's the mid-'80s, I believe, I don't recall exactly,  
19 and the Surgeon General does change the definition to  
20 more behavioral activities, but still some -- I'm  
21 sorry, I can't recall, but it's more of a -- a  
22 behavioral definition. And under that definition  
23 comes the view that nicotine is addictive. But it's  
24 a very wide definition and includes things that are  
25 very common to us like caffeine, Coca-Cola -- I

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1 didn't mean to use a brand name -- colas that have  
2 caffeine, coffee, et cetera. So under that  
3 definition the Surgeon General has said it is  
4 addictive.

5       For my own personal view and observations, I  
6 mean from a personal point of view, I think that --  
7 that the definition -- and the importance here is  
8 what you've already said, is do you give up your  
9 right or freedom or judgment to -- to use the  
10 product, or are you in fact just not making -- not  
11 able to make a decision on your own? Are you truly  
12 addicted and you can't make that decision? And from  
13 my own personal view, and you've asked me about it  
14 previously, I've smoked for a lot of years, I've also  
15 had some times -- once that I quit, really, without  
16 even making a decision about it, just slowly stopped  
17 using the product, and for more than -- at least  
18 about a year I stopped the second time. And if I'm  
19 totally honest, I found it more difficult. And I  
20 think it's clear that if you do anything, from my  
21 perspective, in a -- in -- and it becomes a habit and  
22 you do it for one year, it has one level of  
23 difficulty; if you do it for 30, it's very difficult  
24 to break habits.

25       I've seen personal examples of other behaviors

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1 that are also very difficult to break, and I don't  
2 believe they're -- that that makes it -- says there's  
3 a lack of freedom of -- of choice, that you're, you  
4 know, you're intoxicated or anything else. Some  
5 things are very, very difficult to give up.

6 In statistical terms, there are more people, as  
7 I understand, today statistically that have stopped  
8 smoking than currently smoke. Most of them gave it  
9 up without any medical help. At least there's a very  
10 significant part of the population that has given up  
11 smoking. So do they have a freedom of choice? You  
12 know, my view is it's -- it's -- yes, they do. Some  
13 people are going to find it very, very difficult to  
14 give it up, and the longer they use the product or do  
15 anything else that becomes a habit, they're going to  
16 find it very difficult.

17 Q. Are you done?

18 A. I -- I had more, but I -- I think that expresses  
19 my view.

20 Q. I'm going to move to strike as non-responsive.

21 Sir --

22 A. I'm sorry, you asked me my opinion of addiction.

23 Q. I asked you, actually, just if cigarette smoking  
24 was addictive.

25 MS. FOX: Objection.

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1 A. And that's --

2 Q. That would be -- that would be a question that  
3 could be answered "yes" or "no."

4 MS. FOX: Objection, form.

5 Q. I didn't ask you why you thought that; did I,  
6 sir?

7 MS. FOX: Can I get my objection in before  
8 you argue with the witness, please?

9 Objection to the form of the question,  
10 misleading, vague and ambiguous.

11 Q. Sir, did I ask you why you thought smoking was  
12 addictive?

13 MS. FOX: Objection, assumes facts.

14 A. I would like to go back to the question and have  
15 it read from the record, if you would.

16 Q. Sure.

17 (Discussion off the stenographic record.)

18 Q. Sir, I asked you, and I quote, "Now sir, isn't  
19 it a fact that cigarette smoking is addictive?"

20 "Yes" or "no."

21 MS. FOX: Objection, form, vague,  
22 ambiguous, misleading.

23 A. Can you read on?

24 Q. You said, "That's a question of me?"

25 A. Yes.

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1 Q. And then you gave a speech about why you thought  
2 what you thought. And I don't think I asked you why  
3 you thought what you thought, I just asked you  
4 whether it was a fact that cigarette smoking is  
5 addictive. So let me ask the question again.

6 Isn't it a fact that cigarette smoking is  
7 addictive?

8 MS. FOX: Objection, argumentative,  
9 misleading, vague and ambiguous.

10 A. It's a question that requires a -- an agreement  
11 of a definition of the word that you're asking me.  
12 I -- I tried to provide some basis for that. Without  
13 an agreed definition, a "yes" or a "no" answer is --  
14 is of absolutely no help. In fact it's -- it's  
15 irrelevant.

16 (Plaintiffs' Exhibit 326 was marked  
17 for identification.)

18 BY MS. WIVELL:

19 Q. Sir, showing you what's been marked as  
20 Plaintiffs' Exhibit 326, these are Brown & Williamson  
21 Tobacco Corporation's response to plaintiffs' first  
22 request for admissions, and I'd like to turn your  
23 attention to request number seven. Do you see that,  
24 sir?

25 A. Yes, I see it.

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- 1 Q. It says there, "Admit that cigarettes (or  
2 nicotine) are addictive;" correct?
- 3 A. Yes, I read it. I -- I don't know what this  
4 means, but --
- 5 Q. All right. Why don't you read to yourself the  
6 paragraph that follows.
- 7 A. But I mean, I don't understand the context. Are  
8 these questions asked of someone?
- 9 Q. Asked of Brown & Williamson, and these are their  
10 answers under oath.
- 11 A. Okay.
- 12 Q. Okay? Can you read the paragraph?
- 13 A. Yes.
- 14 Q. Now that's a one-paragraph answer; right?
- 15 A. Yes.
- 16 Q. And it says, "Brown & Williamson objects to  
17 Request for Admission No. 7 on the grounds that the  
18 term and concept of 'addiction' is used by different  
19 people to refer to different things and the request,  
20 therefore, is vague and ambiguous. Brown &  
21 Williamson denies that nicotine or cigarettes are  
22 addictive as that word would likely apply to  
23 substances such as cocaine and heroin. Brown &  
24 Williamson, therefore, denies Request No. 7."
- 25 A. Yes.

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1 Q. You agree with Brown & Williamson's answer here,  
2 sir; don't you?

3 A. Actually the answer I gave a few minutes ago,  
4 which you objected to, I think, while not nearly as  
5 articulate as this, makes me in agreement.

6 Q. Okay. Isn't it a fact, sir, that Brown &  
7 Williamson and the other tobacco manufacturers took  
8 ads out telling the American public that essentially  
9 cigarette smoking was not addictive?

10 A. I'm not aware of the ads.

11 MS. FOX: And just -- just for the record,  
12 this is a document produced out of American Tobacco  
13 Company's files, I believe.

14 (Plaintiffs' Exhibit 327 was marked  
15 for identification.)

16 BY MS. WIVELL:

17 Q. Sir, showing you what's been marked as  
18 Plaintiffs' Exhibit 327, this is a document with the  
19 Bates number MNAT00639587; correct?

20 A. Yes.

21 Q. And it appears to be a press release from The  
22 Tobacco Institute; correct?

23 A. It -- it indicates that it's "The Tobacco  
24 Institute, FOR RELEASE." I -- I don't know anything  
25 about the document, but that's what it shows.

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1 Q. It claims to be a press release; doesn't it,  
2 sir?

3 A. It says -- says "FOR RELEASE," yes.

4 Q. All right.

5 MS. FOX: For the record, before -- before  
6 you go on, I object to this document, it not being a  
7 predesignated document.

8 MS. WIVELL: All right. I want to go off  
9 the record because I believe it was predesignated in  
10 my supplemental correspondence.

11 MS. FOX: I don't see it, Marti. Did you  
12 predesignate it by a different number?

13 MS. WIVELL: There was a letter that I sent  
14 to Jack Fribley in addition to that list.

15 MS. FOX: Well I'll take your word for it  
16 because I don't have that letter with me.

17 MS. WIVELL: Well it's just to the best of  
18 my recollection.

19 MS. FOX: I mean I -- I recall that you  
20 sent a letter with three additional documents, and I  
21 will take your word for it, that this was one of  
22 those.

23 MS. WIVELL: I believe it to be.

24 MS. FOX: And I apologize if I'm incorrect  
25 in saying it's not a predesignated document.

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1 MS. WIVELL: All right. Let's go on.

2 BY MS. WIVELL:

3 Q. This is a press release entitled "CLAIMS THAT  
4 CIGARETTES ARE ADDICTIVE CONTRADICT COMMON SENSE;"  
5 right?

6 A. Yes.

7 Q. And if you --

8 While we were having our conversation, Ms. Fox  
9 and I, did you have a chance to look over the first  
10 page of the document?

11 A. No. I'm sorry. Actually I was looking at the  
12 second page. But --

13 Q. Sir, do you see the -- the fourth paragraph of  
14 the document?

15 A. Yes.

16 Q. Do you see the sentence, "The claim that  
17 cigarette smoking is a drug addiction similar to  
18 cocaine or heroin use, or alcohol abuse, is  
19 unfortunate and unwarranted?"

20 A. Yes.

21 Q. Sir, this -- and this document in the second  
22 paragraph suggests that common sense contradicts any  
23 claim that smoking is an addiction; right?

24 A. Yes, I see it.

25 MS. FOX: Marti, before you ask another

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1 question, are these documents intended to be  
2 connected to each other, because there's a gap in the  
3 Bates range.

4 MS. WIVELL: You know, I just -- I just  
5 noticed that, and I don't believe they are, so I will  
6 withdraw the second page of the document. That may  
7 be the cause of our numbering problems, too. I'm  
8 unsure.

9 MS. FOX: That's fine, as long as we have  
10 the exhibit clear.

11 MS. WIVELL: Yeah.

12 Q. All right. Going on, sir, isn't it also true  
13 that this press release from The Tobacco Institute  
14 claims that "The claims that smokers are 'addicts'  
15 defy common sense and contradict the fact that people  
16 quit smoking everyday;" right?

17 A. Sorry, I'm looking for that.

18 Q. It's the last sentence.

19 A. I see it now. Thank you. Can I --

20 Q. That --

21 A. I just want to read it.

22 Yes.

23 Q. All right. And -- and basically the gist of  
24 this press release is that any claim that cigarette  
25 smoking causes physical dependence is unproven;

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1 right?

2 MS. FOX: Objection, form.

3 A. I'm -- I'm -- I'm not sure that I see a claim  
4 regarding physical dependence. There is a -- there  
5 are several things here that, to me, are very  
6 sensible. I mean it is claimed that cigarette  
7 smoking is a drug addiction similar to cocaine and  
8 heroin use and alcohol, and I don't -- I think it's  
9 very reasonable that this is totally an unwarranted  
10 comparison.

11 Q. That's a totally unwarranted comparison --

12 A. Right.

13 Q. -- as far as you're concerned; right?

14 A. In my view.

15 MS. FOX: Objection.

16 Q. And you've never seen any tobacco company  
17 documents that make those kinds of precise  
18 comparisons; right, sir?

19 A. I don't know if I have or haven't, but I've -- I  
20 have spoken with experts that deal with recovering  
21 cocaine and heroin addicts, and I know a lot of  
22 smokers, and there's just nothing even similar.

23 Q. Now sir, going back to my question, doesn't it  
24 say, "The claim that cigarette smoking causes  
25 physical dependence is simply an unproven attempt to

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1 find some way to differentiate smoking from other  
2 behaviors?"

3 MS. FOX: Objection, form. You mean does  
4 this document say that?

5 MS. WIVELL: Yes, sir.

6 A. Where -- where is that? I'm sorry.

7 Q. Well sir, directing your attention to the  
8 third -- I'm sorry. Strike that.

9 Directing your attention to the first sentence  
10 of the fifth paragraph, doesn't this document say,  
11 and I quote, "The claim that cigarette smoking causes  
12 physical dependence is simply an unproven attempt to  
13 find some way to differentiate smoking from other  
14 behaviors?"

15 A. Yes, it says that.

16 Q. Sir, isn't it a fact that cigarette smoking  
17 causes withdrawal just like heroin and cocaine?

18 A. No. I don't think there's even a close  
19 parallel. People actually die from withdrawal from  
20 cocaine and heroin.

21 Q. Sir, isn't it a fact that people find it easier  
22 to quit the cocaine or heroin habit than it is to  
23 kick cigarette smoking?

24 A. I'm not aware of any evidence like that, and --  
25 and I find it an incredible comparison because,

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1 again, I have direct experience in talking with  
2 experts in this and people that work for Brown &  
3 Williamson in are manufacturing operations where  
4 we've had in the past problems with drugs, and people  
5 that use these lose their families, they lose  
6 their -- their jobs, they -- they go to the bottom  
7 of -- of the world before they recover, if they  
8 recover.

9 Q. Sir, isn't it a fact that a cigarette is a  
10 drug-administration system, has significant  
11 advantages because it reaches the brain faster than  
12 marijuana, amphetamines, alcohol?

13 A. Could you read the first part of that sentence?

14 Q. I'll restate it.

15 A. Thanks.

16 Q. Sir, isn't it a fact that a cigarette is a  
17 drug-administration system?

18 MS. FOX: Objection.

19 Strike the objection.

20 A. I -- I -- I don't think it's a  
21 drug-administration system. It's a -- it's a smoking  
22 article. It does have nicotine, and I am aware of  
23 some of the pharmacological effects, and I -- I think  
24 those comparisons are -- may or may not be right, I  
25 just don't know about the pharmacology of other

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1 substances.

2 Q. Well sir, isn't it a fact that the nicotine  
3 effect reaches the brain faster than marijuana?

4 A. I -- I have already stated I don't know about  
5 the pharmacology of marijuana, but it -- so I just  
6 don't have any basis. It -- it is also a product  
7 that is inhaled, and I assume it gets into the blood  
8 and the blood that's in the lungs goes to the heart  
9 and goes to the brain, but I don't know -- I've never  
10 seen any data regarding marijuana.

11 Q. Well these experts that you talked to, didn't  
12 they tell you that the effect of nicotine on the  
13 human system has a faster effect than amphetamines?

14 A. I'm not familiar with amphetamines, but I think  
15 it's a drug that's taken into the stomach, and I  
16 think that anything that goes into the stomach is  
17 definitely going to be slower than anything that's  
18 inhaled. I mean it just -- first principles of how  
19 the body works.

20 Q. Well sir, isn't it true that nicotine is the  
21 lowest-dose common drug available?

22 A. I don't think nicotine is a common drug. I mean  
23 it is sold as a drug in epidermal patches or -- if  
24 that's the right word -- and nicotine gum.

25 (Plaintiffs' Exhibit 328 was marked

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1 for identification.)

2 BY MS. WIVELL:

3 Q. Sir, showing you what's been marked as  
4 Plaintiffs' Exhibit 328, it is a document Bates  
5 numbered 100503495; correct?

6 A. Yes.

7 Q. This is "Paper No. 7, COLIN GREIG, PROJECT  
8 PROPOSALS, Low Dose" -- I'm sorry.

9 This is headed "Paper 7: COLIN GREIG;" right?  
10 On the first page, sir.

11 A. Yes.

12 Q. Is Colin Greig one of the experts with whom you  
13 have talked that you were referring to a bit ago when  
14 you were talking about the experts that you have  
15 talked about -- talked about addiction with?

16 A. No.

17 Q. Who is Colin Greig?

18 A. I believe he's a product developer in the R&D  
19 Southampton facility.

20 Q. All right. It is Mr. Greig's opinion, as  
21 expressed here, that "A cigarette as a 'drug'  
22 administration system for public use has very  
23 significant advantages;" doesn't it, sir?

24 MS. FOX: Objection, form, assumes facts.

25 A. I have -- I have seen this document because it

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1 made the -- or at least excerpts of it made the --  
2 some press in the United Kingdom, so I've -- I've  
3 looked at this. I am familiar with it. I'm totally  
4 unfamiliar with when it was produced. It -- it  
5 doesn't look like and it's clearly not any kind of  
6 scientific paper. It's a marketing scenario.  
7 There's -- there's no significant data, although  
8 there's data scattered about in this thesis. It says  
9 it's a structured, creative group thesis -- or I'm  
10 sorry, just says it's a structured creative group,  
11 and it's for some marketing think tank. I think it's  
12 about unfortunate use of a lot of language here.

13 It is characterized here "A cigarette as a  
14 "drug" administration system...." I don't think  
15 cigarettes are a drug-administration system, but  
16 that's -- that's what's said here.

17 Q. Move to strike as non-responsive.

18 My question is simply, sir -- this, sir: It is  
19 Mr. Greig's opinion as expressed here that a  
20 cigarette is a drug-administration system for public  
21 use which has very significant advantages.

22 MS. FOX: Objection, assumes facts and  
23 foundation.

24 A. I guess I don't know what Collin Greig's view  
25 is.

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1 Q. All right.

2 A. But what -- what is here, in a structured  
3 creative program, a think piece, it -- it says those  
4 words.

5 Q. And it says, quote, "A cigarette as a, quote,  
6 drug, quote, administration system for public use has  
7 very very significant advantages;" right?

8 A. It -- it says that. I don't agree with it, but  
9 that's what this -- this paper says.

10 Q. All right. And Colin Greig was one of the  
11 people who was moved to G.R.D.C. during the  
12 reorganization of Southamptton research facilities in  
13 1985; wasn't he?

14 MS. FOX: Objection, foundation.

15 A. I don't -- I don't know anything about the  
16 background of Colin Greig. I -- I have run across  
17 him, in fact, since I've been at B.A.T., so I do know  
18 that he's currently in product development, but I  
19 don't know his past.

20 Q. All right. Now in this paper Mr. Greig gives  
21 some information on the speed that it takes for  
22 nicotine to be available to the brain; right?

23 A. Again, I don't know about the factual accuracies  
24 of -- of any of this information because it's not a  
25 technical paper, but I -- I see -- I see that written

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1 here.

2 Q. Well sir, isn't it a fact that you knew that  
3 there was a hit that occurred when a cigarette is  
4 inhaled by the smoker?

5 MS. FOX: Objection, form.

6 A. I'm -- I'm aware of the smoking experience. I'm  
7 a smoker.

8 Q. Sir, and you agree that there is a hit, a  
9 nicotine hit that occurs when a person inhales a  
10 cigarette; right?

11 MS. FOX: Objection, form.

12 A. It's -- it's not the way I would describe it.  
13 There's certainly some impact in the throat when you  
14 inhale. There obviously are, because I've seen  
15 articles about it, I don't know it in detail, but  
16 there -- there is a nicotine that travels, whether  
17 it's 10 seconds or -- or not I don't know, to the  
18 brain after inhaling smoke into the lungs.

19 Q. Well wasn't that referred to in the -- with the  
20 people that you communicated with as the reward to  
21 the smoker?

22 A. It's not a way I communicate. I've heard a lot  
23 of loose language over the years describing things in  
24 various ways.

25 Q. But sir, that is language that has been used in

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1 communications with you, talking about the reward  
2 that a smoker gets when they inhale; right?

3 MS. FOX: Objection, form.

4 A. I've -- I've heard that expressed. People that  
5 I've spoken to about -- you know, which would be the  
6 preponderance of -- of people, wouldn't describe it  
7 that way. I'm not saying that I've never heard those  
8 terms. I have.

9 Q. Who's Cora Ayers, Dr. Ayers?

10 A. Dr. Ayers. I believe he's from BATCO, but  
11 I'm -- yeah, I'm -- I'm relatively sure he's from  
12 BATCO.

13 Q. He's a scientist; isn't he?

14 A. He's either a scientist or one of their top  
15 administrators. I'm not sure that I know him  
16 personally.

17 Q. Well you've communicated with Dr. Ayers; haven't  
18 you, sir, and he's communicated with you?

19 MS. FOX: Objection.

20 Q. Isn't that right?

21 MS. FOX: Objection, compound.

22 Q. All right. Let me uncompound it.

23 Sir, you have received communications from Dr.  
24 Ayers; haven't you?

25 A. I actually don't recall it, but I -- I must

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1 have. You have a document that I think you're  
2 indicating that I did. I don't recall right now.

3 Q. Well sir, we've looked at one of those documents  
4 in this deposition; haven't we?

5 A. I'm sorry, but I guess I've forgotten it.

6 Q. And sir, isn't it a fact that Dr. Ayers talked  
7 to you about the reward that a smoker gets when he or  
8 she inhales?

9 A. That language may have been used.

10 Q. And isn't it a fact, sir, that Dr. Ayers helped  
11 you set up a conference on nicotine that we talked  
12 about earlier in this deposition?

13 MS. FOX: Objection, form.

14 A. I now recall the document. No, he didn't help  
15 me set up. I was -- I was not setting up a nicotine  
16 conference. There was a nicotine conference being  
17 set up, and I think now the -- the memo comes to  
18 mind. It was -- I don't recall all of it, but it was  
19 requests for who from Brown & Williamson would --  
20 would attend, I think would characterize it.

21 Q. And one of the issues was how to get more reward  
22 for the smoker out of smaller amounts of nicotine;  
23 isn't that true, sir?

24 MS. FOX: Objection, form.

25 A. I don't know if that was the hypothesis or not.

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1 It may be. And -- and I'm sure there's a record of  
2 what the conference was. I'm -- I'm unaware of, in  
3 fact, the possibility of getting more reward for --  
4 for nicotine.

5 Q. Sir, could you get out Exhibit 312. I think  
6 it's over there close to the top of that pile. 312.  
7 I'm sorry, 321. My apologies.

8 A. 321?

9 Q. 321.

10 Exhibit 321 is a letter that you received dated  
11 January 23rd, 1984; correct?

12 A. That I received January 23rd?

13 Q. On or about January 23rd, 1984.

14 A. That's -- that's when the letter was dated. I  
15 assume it took some time to get to me.

16 Q. Dr. Ayers wrote this memo -- letter; right?

17 A. Yes.

18 Q. And he copied the head of research and  
19 development at BATCO, Dr. Blackman; right?

20 A. Yes.

21 Q. He also copied Dr. -- or Mr. Read; right?

22 A. Yes.

23 Q. Who is Mr. Read?

24 A. At this time he was a -- a researcher or  
25 department head within BATCO.

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1 Q. Now sir, this sentence --

2 This document contains the phrase, "...we have  
3 to evolve ways and means of ensuring that smaller  
4 amounts of nicotine continue to give a satisfactory  
5 'reward' to the smoker;" right?

6 A. Where did you read that from?

7 Q. The bottom of the first page, sir.

8 A. That's what it says. And obviously it was -- in  
9 my judgment it was a hypothesis at that time because  
10 I think -- I'm totally unaware -- this --

11 This undoubtedly was Dr. Ayers' point of view,  
12 that this would be an area of discussion or a  
13 hypothesis to consider. I'm unaware of any  
14 possibility of -- of changing the pharmacology of  
15 nicotine. I'm not an expert, but it's never been  
16 described to me.

17 So that's what this says, but I think it has to  
18 be a hypothesis because I think it's in fact wrong,  
19 the hypothesis that's put forward here.

20 Q. Sir, move to strike as non-responsive.

21 My question is simply this: Exhibit 321 states,  
22 quote, "...we have to evolve ways and means of  
23 ensuring that smaller amounts of nicotine continue to  
24 give a satisfactory 'reward' to the smoker," close  
25 quote; right?

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1 MS. FOX: Objection, asked and answered.

2 A. I can only put this in another context, which is  
3 a recognition that the industry is continuing to  
4 reduce the tar and nicotine levels, in many cases by  
5 government regulation. And while it says "nicotine  
6 reward," it -- it -- it might be certainly the reward  
7 in terms of the total smoking experience, because I'm  
8 unaware of the possibility of any nicotine changes in  
9 pharmacology that are possible.

10 Q. Sir, I'm going to move to strike as  
11 non-responsive. And with all due respect, I didn't  
12 ask you for your opinion, I asked you simply this,  
13 and I'll restate my question.

14 The document says, quote, "...we have to evolve  
15 ways and means of ensuring that smaller amounts of  
16 nicotine continue to give a satisfactory 'reward' to  
17 the smoker." That's what it says; right?

18 MS. FOX: Same objection.

19 A. I'll -- I'll at least put it in the context of  
20 the whole sentence, which is -- you're -- you're  
21 taking a part of a sentence here. It says, "My  
22 translation is that, in the future, we have to evolve  
23 ways and means of ensuring that smaller amounts of  
24 nicotine continue to give satisfactory 'reward' to  
25 the smoker." That's what that entire sentence says.

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1 If you just want me to read it, that's what it says.

2 Q. All right. And the word "reward" is put in  
3 quotes now; isn't it?

4 A. Yes.

5 Q. Now can you turn your attention back to Exhibit  
6 328. There on the first page Mr. Greig talks about  
7 smoke impact giving an instantaneous catch or hit;  
8 right?

9 A. I see those words.

10 Q. All right. And it says, if we go on, "Other  
11 'drugs' such as marijuanha, amphetamines, and  
12 alcohol are slower..." doesn't it?

13 A. And he -- he puts the word "drugs" in -- in  
14 paren, which I would. You know, frequently we call  
15 nicotine or -- or caffeine or whatever a drug.  
16 That's not to mean in the sense of FDA context. But  
17 yes, that's what he says. I don't know if that's  
18 right or not, but that's what's here.

19 Q. All right. And could you turn to the next page  
20 of Mr. Greig's memo. And there do you see where he  
21 says, quote, "Thus nicotine is about the lowest dose  
22 'common' drug available," close quote?

23 It's the third sentence on the page, sir.

24 A. Sorry, I couldn't find it for a moment.

25 MS. FOX: While you're looking, Mr.

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1 Kohnhorst, this document is not on the exhibit list  
2 that you predesignated, I don't believe. Again, if  
3 I'm wrong and it's one of the three in this letter,  
4 please tell me.

5 MS. WIVELL: This is impeachment.

6 MS. FOX: I'm going to finish. I don't  
7 believe you're using the document as proper  
8 impeachment right now, so I'm stating my objection  
9 for the record.

10 A. The -- the question is?

11 Q. Let me restate it.

12 Sir, and if you turn to the third page of the  
13 document, Mr. Greig says, quote, "Thus nicotine is  
14 about the lowest dose "common" drug available;"  
15 correct?

16 A. That's what it says. It's a ridiculous  
17 comparison. That's what it says.

18 Q. Now Mr. Greig goes on in this memo to talk about  
19 designing a compensible cigarette where a smoker may  
20 be able to achieve delivery he needs at the time  
21 rather than smoking two low-tar cigarettes; right?

22 MS. FOX: Objection, form and foundation.

23 A. Would -- would you mind pointing me to where  
24 you're reading?

25 Q. I'm not reading from a document, sir.

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1 A. Okay.

2 Q. But he does make that allegation here in the  
3 document; doesn't he?

4 MS. FOX: Well it sounds like you're  
5 reading from the document.

6 MS. WIVELL: Excuse me. If you have an  
7 objection, please just say "objection."

8 MS. FOX: I object to your question to the  
9 witness. You expressed that -- well I object, you're  
10 being misleading. Do you want the witness to put the  
11 document away while you ask the question, or do you  
12 want him to refer to the document?

13 Q. Sir, isn't it --

14 You said you've read this document; right?

15 A. I -- I did look over this document. I'm not  
16 sure that the -- the whole thing was published. But  
17 it's very, very long and it's very difficult to  
18 remember from months ago what -- what was in it in  
19 detail. But I mean I'll be glad to try to answer  
20 your questions if I know --

21 Q. Well sir, --

22 A. Do you want my memory?

23 Q. -- Mr. Greig talked in this document about  
24 compensation; didn't he?

25 A. I believe --

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1 MS. FOX: Objection. Objection,  
2 foundation. Go ahead.

3 A. -- from recollection that that may be in here.

4 But I'd be glad to look and see if I can find it.

5 Q. Why don't you tell us what compensation is.

6 A. I think there might be multiple definitions or  
7 understanding of compensation. I think the first I  
8 would say is that there are standard methods for  
9 establishing tar deliveries on cigarettes. They're  
10 prescribed, I believe would be the right word, by the  
11 FTC in terms of how cigarettes are smoked and  
12 establish their tar and nicotine ratings that are  
13 required in our advertising.

14 I think it's known that people can smoke  
15 cigarettes, though different than the smoking  
16 machine; they can smoke -- they can take more puffs,  
17 they can take larger puffs, they obviously can smoke  
18 more cigarettes. But that -- that may or may not be  
19 considered compensation, probably not. So I think  
20 the first comments I made would -- would define it.

21 Q. All right. And isn't it true, sir, that there  
22 are other ways that smokers can compensate so that  
23 they can get more nicotine?

24 A. I said take more puffs, take larger puffs.

25 Q. Well they can cover up the ventilation holes in

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1 the filter and, by doing that, consciously or  
2 unconsciously, they will inhale more nicotine; won't  
3 they?

4 A. Yes. If you block ventilation holes you would  
5 get more tar and nicotine. You'd get more smoke,  
6 yes.

7 Q. And sir, if you took the filter off a filtered  
8 cigarette and smoked -- smoked it that way, you would  
9 get more nicotine; right?

10 A. That would be an enormous compensation compared  
11 to the smoking machine.

12 Q. Okay. And just so we're clear here,  
13 compensation occurs; doesn't it?

14 A. I have seen some studies that in fact -- that  
15 have tried to quantify to some extent, and I think  
16 there is some evidence that shows, particularly as  
17 people move down from high-tar to lower-tar brands,  
18 that they compensate for a period of time and then  
19 get closer to the -- to lower deliveries. But -- so  
20 there's -- there's some compensation when they change  
21 products.

22 Q. Now you understand that Mr. -- one of the things  
23 Mr. Greig advocated in this memo was producing a  
24 lower-nicotine cigarette; right?

25 A. A lower-nicotine cigarette. That -- that I

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1 don't recall from memory.

2 Q. Well, doesn't he talk about leaving smokers  
3 unsatisfied?

4 A. Again I don't recall that from memory.

5 Q. All right. Well didn't he conclude that if the  
6 tobacco companies created a lower-nicotine cigarette  
7 that left consumers unsatisfied, they'd smoke more?

8 A. I -- I don't know if he did or not, but I -- I  
9 think that would --

10 That's an idea to put yourself out of business,  
11 because if cigarette -- if the smokers don't like the  
12 cigarette, they'll buy another brand.

13 Q. But if they smoked more cigarettes to compensate  
14 for the lower nicotine, isn't it true, then, that all  
15 the cigarette companies would have to do is get a  
16 bigger bag to carry the money to the bank?

17 MS. FOX: Objection, form, argumentative.

18 A. That may be your idea, but I don't think it's a  
19 good one. I don't think that there's any data that  
20 suggests as you lower the deliveries of cigarettes  
21 you sell more.

22 Q. Well could you turn to the very -- second-to-  
23 last page of this document.

24 A. Is that 05?

25 Q. 05.

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1 A. Yes.

2 Q. And the last paragraph says, "Let us provide the  
3 exquisitess, and hope that they, our consumers,  
4 continue to remain unsatisfied." Have I read it  
5 correctly so far?

6 A. Yes.

7 Q. Then would you please read the last sentence.

8 A. He's got the same bad idea you do. It's just --  
9 just not a practical commercial --

10 Those words are there, and I'll be glad to read  
11 it all. It -- it's just -- like the rest of this  
12 document, it's just hypothesis, and this is just dead  
13 wrong commercially. That's all it --

14 Q. And what he says is, "All we would want then is  
15 a larger bag to carry the money to the bank;" right?

16 A. That's what he says.

17 Q. Now sir, isn't it true that Brown & Williamson  
18 has known for years that cigarette smoking is  
19 addictive?

20 MS. FOX: Objection, form.

21 A. We -- we talked about addiction earlier, and you  
22 have information here on Brown & Williamson's opinion  
23 about addiction and I've agreed with it. I think  
24 that answers the question, that -- that there isn't a  
25 belief that it's addictive.

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1 Q. I'm sorry, I have a little hearing problem.

2 A. There is not.

3 Q. There is not.

4 Sir, showing you what's previously been marked  
5 as Exhibit 178 in this litigation --

6 MS. FOX: I'll take the one with your notes  
7 on it.

8 MS. WIVELL: That's okay.

9 Q. Sir, showing you what's previously been marked  
10 as Exhibit 178, this is a document dated August 24th,  
11 1978 from M. J. McCue to H. D. Steele; correct?

12 A. Yes.

13 Q. And it -- the subject is "Future Consumer  
14 Reaction to Nicotine;" right?

15 A. That's what it says, yes.

16 Q. And the second paragraph states, "Very few  
17 consumers are aware of the effects of nicotine, i.e.,  
18 its addictive nature and that nicotine is a poison."  
19 Have I read that correctly?

20 A. That's what it says. I don't think it's right  
21 on either point.

22 Q. Move to strike as non-responsive.

23 Sir, isn't it a fact that that document says,  
24 quote, "Very few consumers are aware of the effects  
25 of nicotine, i.e., its addictive nature and that

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1 nicotine is a poison?"

2 A. That's what the document says from these  
3 marketing people, yes.

4 Q. Well sir, you -- you understand that nicotine is  
5 a poison; right?

6 A. No. In the -- in the form that it's used in the  
7 product, which is very, very low levels, there's been  
8 a tremendous amount of toxicological information  
9 developed on nicotine and it's not a poison. There  
10 are forms of nicotine in -- in very, very high or  
11 pure concentrations that is in fact used as an  
12 insecticide, so in that kind of a system, yes, this  
13 is a poison. And this is an example of very careless  
14 language, because it's -- I think you can get a room  
15 full of toxicologists and they will not come to the  
16 view that nicotine is a poison in the cigarette  
17 that's delivered.

18 MS. WIVELL: I need to go off the record  
19 and have the court reporter get an exhibit, and I  
20 need to dig one out.

21 THE REPORTER: Off the record, please.

22 (Discussion off the record.)

23 BY MS. WIVELL:

24 Q. Sir, while we were off the record I gave you a  
25 copy of what has been previously been marked as

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- 1 Deposition -- Deposition Exhibit 179; right?
- 2 A. Yes.
- 3 Q. And this is a document entitled "SMOKE
- 4 CONSTITUENTS AND THEIR RELATION TO QUALITY, BRISTOL
- 5 CONFERENCE, APRIL, 1954;" correct?
- 6 A. Yes.
- 7 Q. And it's by I. W. Tucker; right?
- 8 A. Yes.
- 9 Q. Now Mr. Tucker --
- 10 Was it Dr. Tucker or Mr. Tucker?
- 11 A. I'm not certain.
- 12 Q. He was the first research and development
- 13 director at Brown & Williamson; wasn't he, sir?
- 14 A. I believe that's right.
- 15 Q. All right. Would you turn to the page that's
- 16 Bates numbered 438.
- 17 A. Yes.
- 18 Q. All right. There do you see a table that
- 19 contains nicotine?
- 20 A. Yes, I do.
- 21 Q. And the toxicity of nicotine is discussed there;
- 22 isn't it, sir?
- 23 A. Yes.
- 24 Q. And it says under "TOXICITY," "40 milligrams -
- 25 death in five to 30 minutes;" right?

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1 A. It says that. I don't know what it refers to,  
2 if it's some animal system or what. It's -- I'll  
3 have to look and see if I can --

4 Q. Well that's what it says there, though; doesn't  
5 it, sir?

6 A. Yes. If you want me to put it into any context  
7 or if you just want to put data out that we don't  
8 know what it refers to, that's what it says.

9 Q. Move to strike, non-responsive.

10 Sir, under "TOXICITY" it says "40 mg - death in  
11 five to 30 minutes;" right?

12 MS. FOX: Objection, asked and answered,  
13 argumentative.

14 A. I think any toxicity information has to be  
15 talking about the system to be meaningful, so the --  
16 the data is what it is. I don't know what it refers  
17 to.

18 Q. Move to strike as non-responsive.

19 Sir, under "TOXICITY" it says "40 mg - death in  
20 five to 30 minutes;" right?

21 MS. FOX: Objection, foundation. Also,  
22 objection, misleading in reading the document.

23 A. I don't know what this information is here.

24 Q. But that's what it says; isn't it, sir?

25 MS. FOX: Objection, foundation and

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1 misleading in reading the document.

2 A. There is information here on toxicity, and the  
3 numbers that you -- it says 40 milligrams. I don't  
4 know what -- what system this is involving.

5 Q. All right. Let's turn our attention to the  
6 column "PHYSIOLOGICAL EFFECTS." And under  
7 "PHYSIOLOGICAL EFFECTS" for nicotine it says that  
8 "Nicotine is one of the most fatal & rapid of  
9 poisons;" doesn't it, sir?

10 A. It says that. It's --

11 Obviously it's not talking about the dose levels  
12 of nicotine in cigarettes.

13 Q. Move to strike as non-responsive.

14 Sir, my question is simple, and it will go a  
15 whole lot faster and we'll get done a whole lot  
16 quicker if you just answer my questions. I object  
17 and I move to strike as non-responsive.

18 Sir, my question is simply this: It says,  
19 "Nicotine is one of the most fatal & rapid of  
20 poisons;" doesn't it, sir?

21 MS. FOX: Objection, argumentative and  
22 foundation.

23 A. I don't know the basis of any of this. This  
24 does not look like anything involving cigarettes.  
25 The dose of nicotine --

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1           This document says what it says. I don't know  
2 about this information, but this piece of paper  
3 you're reading from, you're reading from it  
4 accurately.

5 Q.   And this piece of paper came out of Brown &  
6 Williamson's files; didn't it, sir?

7 A.   I don't know the source of this, but perhaps I  
8 could determine that.

9 Q.   You've not seen this document before?

10 A.   I may have seen part of this document, I'm not  
11 certain.

12 Q.   You saw it in preparation for your deposition  
13 today?

14 A.   I may have seen parts of this. I haven't  
15 focused on the page we're on before, so this --

16           All I can say is this does have I. W. Tucker's  
17 name on it, and I believe that sounds like the R&D  
18 director, whatever his title was, responsible for R&D  
19 at Brown & Williamson. There is toxicity information  
20 here. I just don't know the basis, which is  
21 reasonable to ask for when you talk about a toxic  
22 dose. I don't know what this system is. I -- I  
23 can't explain the information. It may be in this  
24 report.

25 Q.   All right, sir. But you would agree, at least,

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1 that there is information from within Brown &  
2 Williamson's files that shows that nicotine was a  
3 poison?

4 MS. FOX: Objection.

5 A. In -- in some systems nicotine, and I've already  
6 said it, in a pure form in -- in large -- not large,  
7 in much larger doses than are in a cigarette, which  
8 are very, very tiny, it is -- it is -- does have a  
9 high level of toxicity and is used for an insecticide  
10 in pure forms.

11 Q. Sir, who is Sir Charles Ellis?

12 A. He's -- I don't believe he's alive, but I  
13 believe he was a consultant, very well-known  
14 scientist that consulted for Southampton R&D many  
15 years in the past. I can't place the years.

16 Q. He was an employee; wasn't he?

17 MS. FOX: Objection, form. Employee of  
18 whom?

19 Q. Let me strike the question.

20 Sir Charles Ellis was an employee of  
21 British-American Tobacco Company Limited; wasn't he,  
22 sir?

23 A. I could be --

24 I could have information that's not correct, but  
25 it was my understanding that he was -- was not an

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1 employee but a very heavily-used consultant. But  
2 I -- I could be wrong. That -- that is the  
3 information that I was -- that I'm aware of from  
4 years in the past, but it could be wrong.

5 Q. Well he served British-American Tobacco Company  
6 Limited in various meetings that the company had over  
7 the years concerning smoking-and-health issues; isn't  
8 that right?

9 MS. FOX: Objection, form.

10 A. It -- it could be right. I'm not aware of  
11 the -- the history one way or the other and how much  
12 involvement, but I -- I -- I've heard his name a  
13 number of times, so I -- I know he was involved with  
14 the R&D activities. To --

15 The extent I don't know precisely.

16 Q. Heavily involved with R&D activities at  
17 British-American Tobacco Company Limited; wasn't he?

18 MS. FOX: Objection, form.

19 A. I really don't have -- I don't have any  
20 first-hand information. Obviously it was before my  
21 time, and I -- I haven't seen very much that he has  
22 written or anything, so I -- I don't have any  
23 first-hand or even second-hand information to the  
24 extent of his involvement. But he's -- he's well  
25 respected.

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1 Q. And it was his opinion that smoking is a habit  
2 of addiction; isn't it?

3 MS. FOX: Objection, foundation.

4 A. I don't know what his views were on addiction,  
5 and I certainly don't know what his definition was.  
6 I am aware, that period of time, that there wasn't a  
7 very clear definition, and there certainly wasn't a  
8 clinical definition, because I -- I believe this --  
9 this period of time is before the Surgeon General put  
10 together a clinical definition in -- from 1964.

11 Q. Sir, I'm going to move to strike as  
12 non-responsive. And if you don't know Sir Charles'  
13 opinion, you can tell me that. But my question was  
14 simply this: Isn't it true that it was his opinion,  
15 Sir Charles, Sir Charles Ellis's opinion, that  
16 smoking is a habit of addiction?

17 MS. FOX: Objection, argumentative, asked  
18 and answered.

19 A. I don't know --

20 MS. FOX: And foundation.

21 A. I don't know what Sir Charles Ellis's opinion  
22 was. And it's not possible for me to know what his  
23 definition was, and it's -- it's key to having any  
24 understanding at all.

25 Q. But sir, you -- you know what his opinion is

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1 because you've seen documents where he expressed that  
2 statement, "Smoking is a habit of addiction."

3 MS. FOX: Objection, mischaracterizes --

4 Q. Isn't that true, sir?

5 MS. FOX: Objection, mischaracterizes,  
6 foundation, and assumes facts.

7 A. I'm aware that those words have been in print,  
8 and I'm very aware that there -- there's no way of  
9 knowing the meaning without making an assumption of  
10 what his definitions were at that time. That is  
11 essential. We're talking about definitions here.

12 Q. Well sir, you understand that Sir Charles was  
13 involved in two projects for British-American Tobacco  
14 Company Limited that looked at the effect of nicotine  
15 on the body; right?

16 A. I'm not aware of his -- his work.

17 Q. Have you ever seen the Project MAD HATTER  
18 documents?

19 A. I don't -- I don't believe so. I could be  
20 mistaken, but I don't believe so.

21 Q. You've never seen the Project HIPPO documents?

22 A. I've heard of -- I've --

23 I've heard reference to the study. I don't  
24 believe I've seen any documents.

25 Q. Sir, isn't it a fact that Brown & Williamson had

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1 available to it at the time it filed its  
2 interrogatory answers in this case denying that  
3 cigarette smoking was addictive both the results of  
4 the MAD HATTER work that was done and the Project  
5 HIPPO work that was done?

6 MS. FOX: Objection, foundation.

7 A. I don't know what was available to Brown &  
8 Williamson. If these --

9 If there are documents at Brown & Williamson,  
10 then obviously they were available.

11 Q. You just haven't seen them; right?

12 A. I don't believe I have.

13 Q. Could you turn to Exhibit 315. Would you turn  
14 to the page that ends with Bates number 791.

15 I'm sorry, before you do that, just to refresh  
16 the recollection of the ladies and gentlemen of the  
17 jury, this is a research conference document from a  
18 conference in 1962; right?

19 A. Yes.

20 Q. And if we look at the second page, we see that  
21 the subject is "SMOKING AND HEALTH - POLICY ON  
22 RESEARCH;" correct?

23 A. Yes.

24 Q. Now if you look at the third page of the  
25 document, among the delegates from Millbank is listed

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1 Sir Charles Ellis; right?

2 MS. FOX: Objection, foundation.

3 A. Yes, he's shown here on this sheet as a -- as a  
4 delegate.

5 Q. From Millbank; right?

6 A. Yes, that's what it says.

7 Q. And what did you understand Millbank to be?

8 MS. FOX: Objection, foundation.

9 Q. Sir, what was Millbank?

10 MS. FOX: And also -- I'm sorry.

11 Objection. Also, this is one of the documents that  
12 you did not predesignate, and I object to its use;  
13 you're attempting to impeach without foundation.

14 A. Millbank is -- is a location, to start with, and  
15 there have been a lot of different functions there in  
16 that building: head office for BATCO, technical  
17 services, and a lot of other functions. So I -- I  
18 was trying to place myself back, to -- to give you a  
19 proper response, what might have been there in 1962.

20 Q. But we know that in 1962 there was no BATCO, it  
21 was British-American Tobacco Company Limited; wasn't  
22 it?

23 MS. FOX: Objection, foundation.

24 A. I -- I don't know that sequence, but I mean,  
25 it's all a point of record.

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1 Q. Well to the best of your knowledge it was  
2 British-American Tobacco Company Limited; wasn't it,  
3 sir?

4 MS. FOX: Objection, foundation, asked and  
5 answered.

6 Q. In 1962.

7 A. I don't -- I really don't know; this was 10  
8 years before I joined the company. And it -- it is  
9 all a matter of clear record what the company's name  
10 was in those years.

11 Q. All right. But it's also clearly a matter of  
12 record that he was a delegate from Millbank at this  
13 conference, Sir Charles Ellis was; right?

14 MS. FOX: Objection, foundation.

15 A. It -- it shows Sir Charles Ellis as --

16 Q. As a delegate.

17 A. -- as a delegate from Millbank under -- under  
18 this "SMOKING AND HEALTH - POLICY ON RESEARCH" title.

19 Q. All right. Now if you turn to the page that  
20 starts 790, there -- that -- strike that.

21 If you turn to the page that ends with Bates  
22 number 790, you see the heading of a presentation  
23 that he gave; right?

24 A. I don't know if he gave it or not, but I see  
25 a -- a heading here, yes.

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1 Q. It says "THE SMOKING AND HEALTH PROBLEM, Sir  
2 Charles Ellis;" doesn't it?

3 A. Yes, that's what it says.

4 Q. Now if you turn to the next page and the first  
5 complete paragraph, he says, "Lastly, smoking is a  
6 habit of addiction that is pleasurable..." doesn't  
7 he, sir?

8 MS. FOX: Objection, foundation.

9 A. It does say that. It says it's a habit.

10 Q. All right, sir. You knew when you were involved  
11 in R&D and when you were executive vice-president of  
12 B&W that -- that nicotine was a -- strike that.

13 You knew when you were vice-president of R&D for  
14 B&W that nicotine was the key smoke component for  
15 satisfaction; right?

16 A. I was vice-president of RD&E, and I -- I did  
17 have a -- a clear understanding that nicotine was a  
18 natural product, part of tobacco and -- and an  
19 important part of -- of the overall smoking  
20 sensation. Satisfaction is -- is a consumer  
21 descriptor, and I have seen very little correlation  
22 between satisfaction and nicotine.

23 Q. Well sir, wasn't that your basic assumption in  
24 the work that you were doing that eventually involved  
25 ammonia technology, that nicotine was the key

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1 component for satisfaction in cigarette smoke?

2 MS. FOX: Objection, form.

3 A. You know, I --

4 There may be people that have written that. I  
5 have looked at a lot of information that's consumer  
6 information, and satisfaction and nicotine is not  
7 highly correlated. The satisfaction is the overall  
8 smoking experience, how it tastes, what the impact  
9 is, what the irritation level is, what the -- the  
10 draw and mechanics of the product. So there may be  
11 documents that say one thing or another, but it's my  
12 clear view the consumers are certainly not saying  
13 that.

14 Q. That's because consumers are unaware of the  
15 effect of nicotine on the body generally; aren't  
16 they, sir?

17 A. I would -- I would say that that doesn't answer  
18 what I just put on the record. But I do believe that  
19 normal consumers would have a relatively low -- low  
20 level of information about nicotine, certainly some.

21 Q. Sir, isn't it a fact that at the research  
22 conference in Rio de Janeiro, Brazil, that we talked  
23 about earlier in 1983, the subject of the correlation  
24 of nicotine with smoker satisfaction was discussed?

25 A. It may have been.

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1 Q. And isn't it a fact that it was a major  
2 assumption of product development work as it went  
3 forward after that, that --

4 A. Was that a question?

5 Q. I'm not done, I'm sorry. I'm having a little  
6 trouble because I'm not feeling well.

7 A. Sorry.

8 Q. Isn't it a fact that it was -- we're going to --  
9 we're going to keep --

10 MS. FOX: Do you need a break?

11 MS. WIVELL: No. We're going to keep  
12 going. By George, we're going to get him on that  
13 plane.

14 MS. FOX: You're changing colors.

15 MS. WIVELL: Well we're going to keep  
16 going. Okay.

17 BY MS. WIVELL:

18 Q. Isn't it a fact that it was a major assumption  
19 of work that went forward after that in 1983 at the  
20 BAT Group companies that nicotine was the key smoke  
21 component for satisfaction?

22 A. That very well might have been said and it might  
23 have been a hypothesis and there might have been a  
24 number of people that -- that believed that it was  
25 true. I can tell you, because I was very involved,

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1 which was my primary thrust in developing new  
2 products, improved products for -- for taste, and  
3 that was not Brown & Williamson's thrust. And -- and  
4 there's a lot of consumer data that says that that is  
5 not important for satisfaction, certainly not --

6 It's certainly a component, but there -- it is  
7 not highly correlated with -- with nicotine, and it's  
8 not the way we design our products.

9 Q. Sir, could you get out Exhibit 319.

10 THE REPORTER: We have to change tape. Off  
11 the record, please.

12 (Discussion off the record.)

13 BY MS. WIVELL:

14 Q. Sir, while we were off the record, I asked the  
15 court reporter to give you Exhibit 319. Do you have  
16 it, sir?

17 A. Yes, I do.

18 Q. Now I've asked you to direct your attention to  
19 page 756, and that page starts with the heading  
20 "INHALATION AND PRODUCT IMPROVEMENT;" right?

21 A. Yes, it does.

22 Q. And I ask you to look at paragraph 27.

23 A. I thought you said 26, but that's fine.

24 Q. I'm sorry.

25 Paragraph 27 says, quote, "The basic assumption

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1 is that nicotine, which is almost certainly the key  
2 smoke component for satisfaction, is fully released  
3 to the body system before exhalation takes place;"  
4 doesn't it, sir?

5 A. Yes, that's what it says.

6 Q. And sir, this was something that was discussed  
7 at this conference that you attended back in 1983;  
8 isn't it, sir?

9 A. This whole area was discussed, and it's clear  
10 that this is a hypothesis. It's -- it talks right at  
11 the -- the top that there are two potential ways  
12 and -- and it describes the two. So this was  
13 definitely discussed. It is a hypothesis, and that's  
14 someone's hypothesis, and it's clearly stated.

15 Q. Well that was the hypothesis that was discussed  
16 and was basically stated as a major assumption of  
17 work going forward in the future; right?

18 MS. FOX: Objection, mischaracterizes.

19 A. It -- it does say the basic assumption. So it  
20 was a hypothesis, and -- and I think with reams and  
21 reams of consumer information, it's -- it's just not  
22 true. Nevertheless, this was the way B&W designed  
23 their products. This was clearly discussed. I have  
24 no reason to think it wasn't.

25 Q. And sir, as the years went on and more work was

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1 done, you did obtain evidence that showed that the  
2 self-administration of nicotine was the primary  
3 motivation for smoking; isn't that true?

4 A. I'm, of course, not aware of all research that  
5 would have been done all around BAT Group. I'm  
6 totally unaware of any -- any work that Brown &  
7 Williamson has done that I can recall on -- on  
8 self-administration. I mean unless it's just an  
9 understanding of terms. If you're talking about  
10 smoking, yes. And we're certainly aware of -- of, at  
11 least to some extent, the nicotine gum and other  
12 things and -- and we're certainly aware of  
13 pharmacology outside, but work that we did inside  
14 characterized like that I'm not familiar with yet.

15 (Plaintiffs' Exhibit 329 was marked  
16 for identification.)

17 BY MS. WIVELL:

18 Q. Sir, showing you what's been marked as Exhibit  
19 329, this is a group research and development project  
20 report entitled "RECEPTORS FOR NICOTINE IN THE  
21 CENTRAL NERVOUS SYSTEM: RADIOLIGAND BINDING STUDIES,  
22 REPORT NO. RD.1960 RESTRICTED;" correct?

23 A. Yes, that's the title.

24 Q. It's dated March 22nd, 1984; right?

25 A. Yes.

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1 Q. And you received a copy of this document; didn't  
2 you, sir?

3 A. Yes, I'm shown as a copy holder.

4 Q. All right. And you did receive it in the  
5 ordinary course of business; didn't you, sir?

6 A. Yes. It would have come to me or directly to  
7 the library.

8 Q. All right. You would have received it -- strike  
9 that. This is a -- a --

10 This became a Brown & Williamson business  
11 record; didn't it, sir?

12 A. I don't know the -- what that means by "a Brown  
13 & Williamson business record," but it -- it came to  
14 us and we would have kept it in our -- in our library  
15 as a -- as a resource.

16 Q. All right. It came to you at or around the time  
17 that it's dated, March 22nd, 1984; right?

18 A. I would -- I would assume that's right.

19 Q. And who is Wilma Templeton?

20 A. I don't -- I don't believe I know.

21 Q. But this --

22 A. I may --

23 Q. This report was issued by C. I. Ayers; right?

24 A. Yes. I mean this appears to be a -- a -- a

25 BATCO -- oh, I'm sorry. It certainly appears to be a

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- 1 Southampton R&D report.
- 2 Q. All right. Written by people who were
- 3 describing research they had done; right?
- 4 A. I don't have any idea what's in this yet, but --
- 5 Q. All right. Sir, could I direct your attention
- 6 to the page that ends Bates number 070. 070.
- 7 A. Yes.
- 8 Q. Now sir, this is an introductory page to a
- 9 scientific report; isn't it?
- 10 A. It's an introduction page. I'll see what comes
- 11 later.
- 12 Q. Page through it.
- 13 A. Yes, it looks like a scientific report. I don't
- 14 know if they're generating data or -- or summarizing
- 15 it, but it looks like a scientific report so far.
- 16 Q. All right. And there's data in graph form
- 17 that's presented toward the back of the document;
- 18 right?
- 19 A. Yes, I see in the appendix graphs.
- 20 Q. All right. Now if you look at the top of page
- 21 070 you see under the introduction that this document
- 22 reports studies of receptors for nicotine in the
- 23 central nervous systems of rats; right?
- 24 A. Yes.
- 25 Q. And according to this study, didn't it find that

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1 the compounds which were studied confirms the  
2 existence of specific binding sites for nicotine in  
3 the central nervous system?

4 A. I don't know. I don't even know what binding  
5 sites are.

6 Q. All right. Would you turn to page 080 and look  
7 at the first paragraph of the "DISCUSSION" section.

8 MS. FOX: Is there a pending question?

9 Q. Have you had the opportunity to review it, sir?

10 A. I just looked -- looked through it. I see these  
11 word "binding sites." I don't profess to understand  
12 it.

13 Q. Okay. But it does say, "This study confirms the  
14 existence of specific binding sites for nicotine in  
15 the CNS..." right?

16 MS. FOX: Objection, foundation and form.

17 A. On this page, it looks like to me you've read  
18 this accurately. I don't --

19 Q. "CNS" is the typical abbreviation for central  
20 nervous system; isn't that true?

21 A. Yes, I'm familiar with that.

22 Q. Now could you go back to -- to page 070.

23 A. Yes.

24 Q. Would you look in the middle of the page, and  
25 doesn't it say there that "Taken together, the

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1 evidence suggests that self-administration of  
2 nicotine may be the primary motivation for smoking?"

3 MS. FOX: Objection, foundation.

4 A. This is -- this is something that I've heard  
5 described, that there have been a lot of animal  
6 studies, and I don't think there's any conclusive,  
7 repetitive self-administration, but this definitely  
8 talks about "Taken together, the evidence suggests  
9 self-administration of nicotine" -- yes.

10 Q. That's what it says; doesn't it, sir, "Taken  
11 together, the evidence suggests that  
12 self-administration of nicotine may be the primary  
13 motivation for smoking?"

14 MS. FOX: Same objection.

15 Q. Right?

16 MS. FOX: And misleading.

17 A. This is an introduction, so -- these sound like  
18 summary comments, so I -- I would like to read this  
19 because it -- it just doesn't -- it doesn't -- it  
20 didn't seem to be anyplace for conclusions or  
21 something in an introduction.

22 Q. Move to strike as non-responsive.

23 Sir, my question is simply this: Doesn't it  
24 say, "Taken together, the evidence suggests that  
25 self-administration of nicotine may be the primary

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1 motivation for smoking?"

2 MS. FOX: Objection, foundation,  
3 misleading. Please allow the witness to read the  
4 portions of the document that he feels he needs to  
5 read to answer your question.

6 A. You're -- you're reading it correctly, but this  
7 is -- is clearly just a hypothesis based on making  
8 observations in -- in humans.

9 Q. I'm sorry, sir. Where does "hypothesis" appear  
10 in this paragraph?

11 A. The word does not appear. It -- it is clear,  
12 though, that there's first a description of smoking  
13 behavior that talks about the -- the response to  
14 lower and lower nicotines, additionally response to  
15 taking more frequent and larger puffs, and it's  
16 referring back to this, and more it says, "Taken  
17 together, this evidence suggests that  
18 self-administration of nicotine may be a primary  
19 motivation." So this is not a summary comment about  
20 this animal study, this is a hypothesis.

21 Q. Did you talk to Dr. Ayers when you received two  
22 copies of this report about it? Did you talk to Dr.  
23 Ayers about it?

24 A. I don't remember. And I don't believe I did. I  
25 don't -- I'm not even sure that I would have read

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1 this document in detail, given --

2 I'm not even sure I read this document in detail  
3 other than just the summary.

4 Q. You didn't write anyone back at Southampton and  
5 say, "Oh, folks, you're wrong," or anything to that  
6 effect; did you?

7 A. I haven't even suggested that I think they are  
8 wrong.

9 Q. In fact they're right; aren't they?

10 MS. FOX: Objection, argumentative,  
11 mischaracterizes.

12 A. All I have suggested so far is that we read this  
13 introduction, and I now understand that they set up a  
14 hypothesis based on some smoking behavior and a  
15 hypothesis for an animal study that's being proposed.

16 Q. Sir, isn't it a fact that the basic assumption  
17 that you were operating on when you were developing  
18 products for Brown & Williamson was that nicotine was  
19 the key component for satisfaction?

20 MS. FOX: Objection, form.

21 A. The --

22 MS. FOX: And asked and answered.

23 A. The hypothesis I was operating on is very easy  
24 and clear to me, which is we needed to develop  
25 products that have very high consumer acceptance

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1 compared to competitive products in -- in various  
2 categories of tar, and the taste and flavor, mouth  
3 feel, low irritation, were some of the criteria that  
4 I think were very important in developing a -- a  
5 top-quality product, in addition to good smoking  
6 mechanics, pressure drop, and draw and feel.

7 Q. Sir, isn't it a fact that Brown & Williamson  
8 knew full well that what it was trying to do with its  
9 nicotine -- I'm sorry, with its ammonia technology  
10 was to increase the impact, the reward that a smoker  
11 got when they smoked a cigarette?

12 MS. FOX: Objection, compound.

13 A. The -- the ammonia technology was viewed as very  
14 important. I don't think you characterize what --  
15 what we thought its benefits were in terms of  
16 design. I think it's -- it's very clear that the  
17 ammonia technology creates a situation in processing  
18 where Brownian reactions take place that -- that is a  
19 common reaction, although complex, in -- in a lot of  
20 our foods, and it -- it creates a whole list of -- or  
21 a whole -- whole family of compounds, pyrazines and  
22 others that are very good taste factors.

23 Q. Sir, are you denying that Brown & Williamson  
24 engaged in ammonia technology -- strike that.

25 Isn't it a fact, sir, that Brown & Williamson

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1 engaged in ammonia technology to increase impact?

2 MS. FOX: Objection, form.

3 A. The objective, and I'm very clear on, was that  
4 we were trying initially particularly to reduce the  
5 amount of irritation in our products. That's  
6 different from impact. So I -- I guess I'd have to  
7 say on impact I -- I don't recall that being a  
8 significant objective, to -- to increase impact.

9 (Plaintiffs' Exhibit 330 was marked  
10 for identification.)

11 BY MS. WIVELL:

12 Q. Sir, showing you what's been marked as  
13 Plaintiffs' Exhibit 330, this is a document Bates  
14 numbered 400582710; correct?

15 A. I may have misheard, I think you said 7100.  
16 Just one oh?

17 Q. I'm sorry. Let me say it again since I'm having  
18 trouble since I'm not feeling good. It is a document  
19 Bates numbered 400582710; right?

20 A. Yes.

21 Q. Okay. And this is a document dated February  
22 23rd, 1977 entitled "EFFECTS OF LIGHT AMMONIA  
23 TREATMENT ON CIGARETTE SMOKE PROPERTIES."

24 A. Yes, that's the title.

25 Q. It is another restricted document; isn't it?

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1 A. I think you'll find consistently our research  
2 reports are restricted.

3 Q. Now this document was sent to you.

4 A. Yes, it was.

5 Q. You received a copy of it in the ordinary course  
6 of your business at Brown & Williamson; didn't you?

7 A. I assume I did. I wasn't, as you'll recognize,  
8 in the R&D department at that stage. It's -- but I  
9 was sent a copy of it.

10 Q. You were not in the R&D department at this  
11 stage?

12 A. I believe at this stage I'm actually in the  
13 Development Center. But that's -- I mean that's not  
14 an issue. I'm just telling you I'm in the  
15 Development Center.

16 Q. Now could you turn to the second page of the  
17 document where it says "SUMMARY." I think you're  
18 there.

19 A. Yes. Yes.

20 Q. And under number two doesn't it say, "Increased  
21 smoke pH leading to increased impact?"

22 A. This is experimentation, and yes, it says that.

23 Q. And sir, wasn't this work done because Brown &  
24 Williamson's main objective was to substantially  
25 increase nicotine delivery to achieve low-tar normal-

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1 nicotine cigarettes?

2 A. We -- we definitely have had at times the  
3 objective of, in a totally separate area that we  
4 touched on very quickly, to increase nicotine-to-tar  
5 deliveries. I don't think this was involving that at  
6 all.

7 Q. Could you turn to the next page, sir. And  
8 doesn't it say there, quote, "Our main objective is  
9 to substantially increase nicotine delivery to  
10 achieve low tar/normal nicotine cigarettes?"

11 A. Yes, it says that. This -- this was never the  
12 avenue that was progressed, you know, during the time  
13 I'm familiar with R&D, in fact, when they reported to  
14 me. But that's what this document says.

15 Q. Now sir, isn't it true that it was thought at  
16 Brown & Williamson and the BAT Group companies that  
17 the immediate sensory effect associated with nicotine  
18 was impact?

19 MS. FOX: Objection, form.

20 A. I have -- have heard it characterized and -- and  
21 I think smokers recognize it, that there is an impact  
22 on -- when you bring smoke into your mouth and start  
23 to inhale. And I think -- I think while there are a  
24 lot of sensory effects, trigeminal effects and -- and  
25 taste and flavor, I think there is also impact, which

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1 is something you feel in the back of the throat, and  
2 I believe that has been attributed to -- to nicotine,  
3 maybe other compounds as well.

4 Q. And isn't it true that this is also a sensation  
5 that cues the smoker to the fact that they're going  
6 to get this pleasurable sensation they get as soon as  
7 nicotine gets to the brain?

8 A. That -- that's -- that's a little bit more  
9 difficult to really answer accurately. I think -- I  
10 think people find cigarettes pleasurable for a lot of  
11 different reasons, and undoubtedly nicotine plays a  
12 role in that. Taste, flavor, lack of irritation, and  
13 as you say, impact is some level of that whole  
14 package of what you feel about the product.

15 Q. Sir, can you dig out that letter that Dr. Ayers  
16 sent you that we referred to a couple of times  
17 before? I think it's Exhibit 321.

18 That -- have it, sir?

19 A. Yes, I --

20 Q. That's the -- the exhibit that talks about  
21 giving the smoker the reward; right?

22 MS. FOX: Objection, form, vague.

23 A. This is the one that's setting up the delegates  
24 for the nicotine conference.

25 Q. Now you sent delegates to that conference;

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1 didn't you?

2 A. I don't remember who, but I -- I'm pretty sure I  
3 did.

4 Q. And you got back reports about what occurred at  
5 that conference; right?

6 A. I don't remember getting them, but I would -- I  
7 would think the normal course of business there would  
8 be meetings -- you know, meeting minutes.

9 Q. And the person -- who --  
10 Who did you send?

11 A. I think I just said I'm not sure. I don't  
12 recall specifically. I would -- I would think it  
13 would be from one of about three or four people,  
14 which I could name.

15 Q. Please do.

16 A. (clearing throat) Excuse me. Lance Reynolds,  
17 Gil Esterle. Those are the most likely. But it also  
18 could have been Tilford Riehl or Dr. Lauterbach. But  
19 I think that's -- that's the best I can do. I really  
20 don't recall who -- who went.

21 MS. FOX: Marti, --

22 Q. Sir, didn't you go --

23 MS. FOX: -- can we take a break after we  
24 get this answer, a five-minute break? It's okay if  
25 you want to. I'm just asking.

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1 MS. WIVELL: Can I just finish up with this  
2 line of questioning?

3 MS. FOX: Yeah.

4 MS. WIVELL: Okay.

5 MS. FOX: I wasn't trying to interrupt your  
6 flow.

7 BY MS. WIVELL:

8 Q. Sir, isn't it a fact that you went to this  
9 conference?

10 A. I don't recall going to it.

11 (Plaintiffs' Exhibit 331 was marked  
12 for identification.)

13 MS. FOX: Marti, is this one of the ones  
14 that was added in your additional letter, one of the  
15 three?

16 MS. WIVELL: No, it was not. But I didn't  
17 expect to have to impeach him with the fact that he  
18 attended this conference.

19 MS. FOX: Well he simply said he doesn't  
20 remember, but --

21 MS. WIVELL: Can we identify it for the  
22 record?

23 THE REPORTER: It's Exhibit 320 -- or wait  
24 a minute, 331.

25 Q. Sir, just for record --

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1 MS. FOX: I want --

2 MS. WIVELL: I just want to identify it and  
3 then we can take a break.

4 MS. FOX: Okay.

5 Q. Sir, for the record Exhibit 321 is Bates number  
6 107463454; correct?

7 A. Yes.

8 MS. WIVELL: Why don't we take our break.

9 THE REPORTER: Off the record, please.

10 (Recess taken.)

11 BY MS. WIVELL:

12 Q. Sir, while we were off the record you had the  
13 opportunity to look at Exhibit 331; right?

14 A. I've only just looked at the first page of 331.

15 Q. Okay. And I think I misidentified Exhibit 331  
16 in the record.

17 MS. FOX: Also, I'm sorry, this is a  
18 document you haven't predesignated; right?

19 MS. WIVELL: Yeah, and I'm going to correct  
20 a statement I made earlier. But just -- I want to  
21 identify it correctly for the record, because I think  
22 I didn't.

23 Q. Sir, what we have marked as Exhibit 331 is Bates  
24 numbered 107463454; right?

25 A. Yes.

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1 Q. Okay. Now these are not the notes of the  
2 ammonia -- of the nicotine conference that's referred  
3 to in Dr. Ayers' letter to you; is it?

4 A. They don't appear to be to me.

5 Q. You didn't go to that conference; did you, sir?

6 A. That was the best of my recollection, that I  
7 didn't.

8 Q. And these are notes of another conference;  
9 right?

10 A. Yes, this is -- doesn't appear to be the  
11 nicotine conference. It's another conference.

12 Q. Okay. We can put the document aside. That  
13 was --

14 It was a conference that you attended in 1985,  
15 though; wasn't it, sir?

16 MS. FOX: Vague. "It" being this document?  
17 Which conference are you referring to?

18 MS. WIVELL: I'm sorry, it's just because  
19 I'm not feeling terrific.

20 MS. FOX: Marti, that's why I asked the  
21 question.

22 MS. WIVELL: Fair enough.

23 Q. Exhibit 331 is of a conference which you  
24 attended in 1985; right?

25 A. It appears that I did. I'm shown on the

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1 attendees list.

2 Q. Okay. You -- you can put the document aside  
3 unless you choose to refer to it.

4 At that conference the subject of satisfaction  
5 was discussed; wasn't it, sir?

6 A. I'll need to refer to the document. I -- I  
7 don't have recollection of the specific content of  
8 this document. Ten years ago.

9 Q. Fair enough.

10 Do you recall a discussion taking place about  
11 the action of nicotine on the brain?

12 A. Right now I don't recall any of the  
13 discussions. I do have in front of me where there  
14 was a summary -- on the agenda, "SUMMARIES OF RECENT  
15 TECHNICAL EXCHANGE MEETINGS," so again, without  
16 looking at the document -- I'll be glad to if you  
17 want me to, but what's shown on the agenda is a  
18 number of topical areas and -- and nicotine, which I  
19 believe would be referring to that nicotine  
20 conference, apparently there would have been some  
21 summary --

22 Q. All right. Well --

23 A. -- or discussion. But I don't know what -- what  
24 it was and I don't have a recall.

25 Q. Okay.

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1 A. It may be reported in this document.

2 Q. Putting the document aside, however, apart from  
3 that conference, you understand that when a smoker  
4 inhales, within seven seconds nicotine gets to the  
5 brain; right?

6 MS. FOX: Objection, form.

7 A. I do know a little bit about the pharmacology,  
8 and I do understand when you inhale that there's --  
9 nicotine is moved into the upper respiratory tract,  
10 it gets into the blood stream, goes to the heart and  
11 the brain. I don't know the time. You just said  
12 seven seconds. We saw a document a few minutes ago  
13 that said 10 seconds.

14 Q. Well in a relatively brief period. As a smoker,  
15 you're aware that there is a sensation after you  
16 inhale on a cigarette; right?

17 MS. FOX: Objection, form.

18 A. As a smoker I couldn't at all confirm that, the  
19 pharmacology. I think there's been a lot of studies  
20 that establish that, and I'm not disputing it, that  
21 the nicotine does move out of the smoke into the  
22 lungs, ultimately to the brain, in a -- in a short  
23 time.

24 Q. Okay. When you wake up in the morning, how soon  
25 after you wake up do you have your first cigarette

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1 typically?

2 A. Hmm, I normally have a -- my first cigarette  
3 after I get to work, so it's an hour and a half or  
4 two hours after I get up.

5 Q. And you have a very pleasurable sensation after  
6 you inhale that first puff; right?

7 A. I enjoy cigarettes, and particularly after  
8 dinner.

9 Q. Well sir, I'm talking about that first cigarette  
10 of the day. When you inhale that first puff you get  
11 a real -- real pleasurable sensation; don't you?

12 MS. FOX: Objection, asked and answered.

13 A. First thing I want when I get up is a cup of  
14 coffee. And I have a cigarette later. And -- and  
15 yes, I enjoy the first cigarette. Some days I don't  
16 smoke a cigarette all day.

17 Q. Now sir, isn't it -- strike that.

18 You talked a little bit ago about taste being  
19 important. Do you recall that, sir?

20 A. Absolutely.

21 Q. All right. Isn't it true that nicotine  
22 essentially tastes like foul, rotten rubber?

23 A. You know, I don't -- I don't know exactly what  
24 the -- the taste properties are of nicotine because  
25 it's in a very, very complex mix. It's -- it's a bit

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1 like the taste of pepper: it is very objectionable,  
2 but it's very pleasurable in foods. So when you talk  
3 about tastes, you -- you have to talk about the whole  
4 formulation. That's the way it is in foods, that's  
5 the way it is in smoke.

6 Q. But if --

7 You would agree that at certain concentrations,  
8 if you affect the nicotine in the smoke too much, it  
9 will taste like foul, rotten rubber.

10 A. Actually --

11 MS. FOX: Go ahead. Asked and answered.  
12 Go ahead.

13 A. Actually I have seen documents that we've even  
14 gone through today that characterize, I believe,  
15 the -- what would be more of a just clinical taste of  
16 nicotine -- I said "clinical." I don't know what I  
17 mean. I just mean a single component -- that perhaps  
18 were in -- was in the report that -- I don't -- I  
19 don't recall.

20 Q. Dr. Tucker's report?

21 A. It might have. And I think it may have referred  
22 to it as bitter.

23 Q. Bitter. Okay.

24 A. So I don't think I've ever seen a reference  
25 confirming your description.

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1 Q. All right. If there is such a document, you  
2 just haven't seen it; right?

3 A. I don't believe I've seen it. I actually  
4 haven't heard it characterized as that.

5 Q. Now isn't it true that Brown & Williamson  
6 recognized that free nicotine is absorbed into the  
7 blood stream faster than bound nicotine?

8 A. I -- I have talked in recent times with some of  
9 the scientists about our understanding of bound  
10 nicotine and free nicotine, and I think we have a  
11 tremendous amount of confusion in our documents. I  
12 think it's based on just lack of clear understanding.

13 From what I've seen in terms of the literature,  
14 that nicotine -- and we've already covered part of  
15 it -- is removed from the smoke in whatever form it  
16 is, the majority of it, vast majority of it is -- is  
17 bound nicotine, both completely, and the removal of  
18 that nicotine and into the blood stream is -- is very  
19 fast. So I don't think there's a dramatic  
20 difference, if any difference, in terms of nicotine  
21 depending on the form in terms of the -- I think now  
22 we're talking about pharmacokinetics, which means  
23 the -- the rates.

24 Q. Is it your testimony, then, that bound nicotine  
25 does not -- I'm sorry, strike that.

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1           Is it your testimony that free nicotine does not  
2 get into the blood stream faster than bound nicotine?

3   A.   The best understanding I can get from the  
4 scientists is that more -- the majority of nicotine  
5 is bound as opposed to free, and the nicotine is  
6 removed from smoke whether it's bound or particulate  
7 very completely, because there's very little nicotine  
8 that's exhaled by the smoker, which is why that's  
9 known. And as far as I know the pharmacokinetics,  
10 and I don't know much about the pharmacokinetics,  
11 they're not very different. So I don't -- I don't  
12 believe there's a very significant rate, but  
13 that's -- that's the best of my knowledge.

14   Q.   Just so we're clear here, you think that there  
15 is no difference between the speed of transfer of  
16 bound nicotine and free nicotine into the blood  
17 stream.

18           MS. FOX: Objection, asked and answered.

19   A.   I think that both are very completely removed  
20 and both very fast. We've talked about things  
21 happening -- you know, taking place in seven to 10  
22 seconds, so there may be some minor difference, but  
23 they're both so fast it seems not to be an issue.  
24 But I -- I guess I don't know better than what I've  
25 described.

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1 (Plaintiffs' Exhibit 332 was marked  
2 for identification.)

3 BY MS. WIVELL:

4 Q. Sir, showing you what's been marked as Exhibit  
5 332, this is a document Bates numbered 100059066;  
6 right?

7 MS. FOX: Objection. Once again this is  
8 not a predesignated document, and I object to its  
9 use. Also foundation.

10 MS. WIVELL: This is impeachment.

11 MS. FOX: And I believe it's improper  
12 impeachment. Foundation objection.

13 A. The numbers look right.

14 Q. Now sir, this is a document from H. D. Anderson  
15 to R. P. Dobson; correct?

16 A. That's what it says, yes.

17 Q. All right. And it concerns -- or the --  
18 The title of it is "POTASSIUM CARBONATE;" right?

19 A. That's -- that's what it says on the top, yes.

20 Q. Would you turn to the last --

21 MS. FOX: Wait. I'm sorry, could we take a  
22 moment so that I can confer with BATCO's counsel with  
23 respect to whether this document is privileged or  
24 not? It may not be, I recognize that, Marti, I'd  
25 just --

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1 MS. WIVELL: Okay.

2 MS. FOX: -- like to confer.

3 MS. WIVELL: Fair enough. Can we go off  
4 the record?

5 MS. FOX: Yeah.

6 THE REPORTER: Off the record, please.

7 (Discussion off the record.)

8 MS. FOX: Marti, for the record, I've  
9 checked with respect to this document, and I now do  
10 not believe it is privileged.

11 MS. WIVELL: Okay. Thank you.

12 BY MS. WIVELL:

13 Q. While we were off the record, sir, you had the  
14 opportunity to review portions of Exhibit 332, right?

15 A. Yes.

16 Q. The last -- second-to-the-last paragraph says,  
17 "There seems no doubt that the kick, in quotes, of a  
18 cigarette is due to the concentration of nicotine in  
19 the blood-stream which it achieves...." Have I read  
20 it correctly so far?

21 A. Yes.

22 MS. FOX: Object -- objection, foundation.

23 Q. And then --

24 MS. FOX: Improper use of the document. Go  
25 ahead.

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1 Q. And then the sentence says -- goes on to say,  
2 "...and this is a product of the quantity of  
3 nicotine in the smoke and the speed transfer of that  
4 nicotine from the smoke to the blood-stream."  
5 Right?

6 MS. FOX: Same objection, foundation. An  
7 improper attempt at impeachment.

8 A. I've -- I've read the -- the last two paragraphs  
9 and -- and you've read this first paragraph  
10 correctly. I -- I don't know who these people are,  
11 but I -- and I also don't think this is -- this is  
12 accurate. This was somebody's judgment at this point  
13 in time is my -- is my view. I think there's science  
14 already that well understands some of these things  
15 that would -- would -- would say these aren't  
16 reflected accurately to -- or consistent with today's  
17 understanding of nicotine pharmacology.

18 Q. Move to strike as non-responsive.

19 Sir, my -- my question is simply this: And the  
20 paragraph -- and the sentence goes on to say, "...and  
21 this is a product of the quantity of nicotine in the  
22 smoke and the speed of transfer of that nicotine from  
23 the smoke to the blood-stream;" correct?

24 MS. FOX: Objection, same objection, and  
25 asked and answered.

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1 A. Again, and I don't want to waste a lot of time,  
2 you're -- you're reading this accurately. If you  
3 don't want me to -- to comment that I don't know who  
4 these people are, if they're scientists or not,  
5 that's fine. And the fact is there's science that I  
6 think is clearly in conflict with these assumptions.  
7 These appear to be speculations on someone's part;  
8 maybe very informed at the time.

9 Q. Move to strike as non-responsive.

10 Sir, my question is simply: The sentence goes  
11 on to say, "...and this is a product of the quantity  
12 of nicotine in the smoke and the speed of transfer of  
13 that nicotine from the smoke to the blood-stream,"  
14 right?

15 MS. FOX: Same objections, and asked and  
16 answered.

17 A. Someone of unknown credentials, to me at least,  
18 in 1964 apparently wrote these -- these words down.

19 Q. Sir, they also went on to say that nicotine --  
20 strike that.

21 They also went on to say that "...it is almost  
22 certain that the free nicotine base is absorbed  
23 faster into the blood-stream;" didn't they?

24 MS. FOX: Objection, same objections,  
25 foundation and form.

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1 A. Someone in 1964 made that speculation.

2 Q. All right. So you don't know what they based  
3 this statement on; do you, sir?

4 A. No, I really don't. And that's a very good  
5 point. Neither of us do.

6 Q. All right. But we do know that they said it;  
7 right?

8 MS. FOX: Objection, foundation and  
9 misleading.

10 A. I don't -- I don't even know if this is a final  
11 document. In fact it looks like it even is a draft.  
12 I don't --

13 Q. Sir, does it say "draft" anywhere on it?

14 A. I was looking up here. It might say -- I wasn't  
15 sure. I was looking back at the -- the back page and  
16 it doesn't appear to have any initials. It seems to  
17 have words crossed off and -- and written in in  
18 handwriting. So it -- it may or it may not be.

19 Q. You just don't know one way or the other; right?

20 A. I don't. I really know nothing about this  
21 document, that's true.

22 Q. All right. But it does show cc to two different  
23 people; right?

24 MS. FOX: Objection, foundation.

25 A. Actually I don't think it is. I think it says

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1 "c.c. R. and D. E."

2 Q. RD&E; right? And then if you look at the front,  
3 it says -- there's a stamp that shows it was received  
4 at research and development; right?

5 MS. FOX: Objection, foundation.

6 A. It's very difficult to read, but it may -- it  
7 may be a stamp.

8 Q. That says "Research & Development;" right?

9 A. Yes, I -- I think it does. It's very difficult,  
10 but it looks -- it looks like it is.

11 Q. All right. And it clearly was produced by  
12 BATCO. We know that because of the legend at the  
13 bottom of the document; right?

14 MS. FOX: Objection, foundation.

15 A. I see the "BAT Co Ltd. Minnesota Tobacco  
16 Litigation" stamp.

17 Q. And sir, isn't it true that while you were at  
18 Brown & Williamson that you received documents where  
19 Brown & Williamson was analyzing ammoniated tobacco  
20 to test for impact?

21 MS. FOX: Objection, form.

22 A. We would have --

23 We did a huge amount of work in -- in  
24 development activities using different ammonia  
25 processes, reaction processes to produce these

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1 flavors that I described earlier, and we would have  
2 been looking at the consumer -- the consumer  
3 acceptance which would have included impact and taste  
4 and flavor and aftertaste and a whole host of  
5 things. So I think the answer is yes, that, among a  
6 lot of other things.

7 Q. Sir, isn't it true that Brown & Williamson spent  
8 millions and millions of dollars to study ammoniated  
9 tobacco to try and produce the impact of a Marlboro  
10 cigarette?

11 A. I think it mischaracterizes, but I think most of  
12 your facts are -- are right. We spent millions and  
13 millions of dollars in trying to make a -- a product  
14 that would be superior to Marlboro. One aspect of  
15 that was a lot of work actually to try to match  
16 Marlboro. There were other activities as well. And  
17 yes, ammonia was -- was an important part of that.  
18 And in many of our documents it says "key,  
19 essential," et cetera.

20 Q. Have you read Mr. Reynolds' testimony on the  
21 subject of ammonia technology at Brown & Williamson?

22 A. His testimony?

23 Q. His testimony, yes, sir.

24 A. No. Absolutely I haven't seen it.

25 Q. Isn't it a fact that Brown & Williamson spent

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1 millions and millions of dollars to try and find out  
2 what gave Marlboro the smoking impact that it has?

3 MS. FOX: Objection, asked and answered.

4 A. Yeah, that was -- that was definitely not a fair  
5 way of characterizing what we did. We -- we  
6 definitely spent a significant amount of money, and  
7 appropriately so, because it's a very important part  
8 of our business is to make our products taste better,  
9 trying to match Marlboro, trying to develop  
10 alternative processes to make -- make a superior  
11 product, and ammonia technology was definitely one of  
12 the very important ingredients in that -- that whole  
13 development area.

14 Q. And that process went on through the '80s;  
15 right?

16 MS. FOX: Objection, form.

17 A. I would say the -- the activity to develop a  
18 superior product, one leg of which was to match a  
19 Marlboro, started -- it's -- it's hard to say exactly  
20 where anything starts because you've already showed  
21 me some documents from Bob Johnson that frankly I  
22 wasn't aware of that talks about ammonia, but in a  
23 very different context, even years before. But from  
24 my perspective, the significant start in 1983, and  
25 probably intensively for four years with continuing

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1 activity for several years after that.

2 (Plaintiffs' Exhibit 333 was marked  
3 for identification.)

4 BY MS. WIVELL:

5 Q. Sir, showing you what's been marked as  
6 Plaintiffs' Exhibit 333. This is a document that  
7 begins with the Bates number 510004196; correct?

8 A. Yes.

9 MS. FOX: Marti, let me just ask for the  
10 record, there appear to be two documents here. Do  
11 you intend for these documents to be connected --

12 MS. WIVELL: I believe that that's --

13 MS. FOX: -- in your questioning?

14 MS. WIVELL: -- the way that they were  
15 presented to us.

16 MS. FOX: That's why I'm asking the  
17 question, because we had earlier two documents  
18 together that didn't go together.

19 BY MS. WIVELL:

20 Q. Now sir, the first portion of this document is a  
21 memo on the personal stationery of A. McMurtrie;  
22 right?

23 A. Yes.

24 Q. And it is attached to a file note dated April  
25 16th, 1984, concerning the effects of varying smoke

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1 pH on Raleigh Kings; correct?

2 A. Yes, that's what the file note says.

3 Q. And this --

4 These two documents, which were produced to us  
5 together and are Bates numbered consecutively,  
6 concerned ammonia technology work that was being done  
7 at Brown & Williamson; right?

8 MS. FOX: Marti, I believe you're  
9 mischaracterizing the document, and I don't think  
10 intentionally. It appears in fact to be three  
11 documents, now that I look closely at it, and I just  
12 want to draw that to your attention.

13 MS. WIVELL: All right. Let's start  
14 again. Because you're right, the Bates numbers are  
15 not consecutive.

16 MS. FOX: Well actually I believe --

17 MS. WIVELL: They are.

18 MS. FOX: -- the Bates numbers are  
19 consecutive. My point is, to help you out, there's  
20 one document that you identified on the stationery of  
21 A. McMurtrie, there -- and that's two pages, there's  
22 a second document that appears on stationery of T. F.  
23 Riehl, and then there's the third document, which is  
24 the file note that you referred to.

25 MS. WIVELL: All right. Let me start

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1 again.

2 BY MS. WIVELL:

3 Q. The first part of this document is on the

4 stationery of A. McMurtrie; right?

5 A. Yes.

6 Q. Who is A. McMurtrie?

7 A. Mr. McMurtrie is one of the -- is the most

8 senior product developer at Brown & Williamson.

9 Q. And Mr. McMurtrie was involved in the work on  
10 the reverse engineering of Marlboro; wasn't he, sir?

11 A. Almost everybody in R&D really gets involved in  
12 one way or another. He wouldn't be the guy that I  
13 would say was driving that effort, but undoubtedly  
14 was involved with it.

15 Q. Who was the guy who was driving the effort?

16 A. I said "guy." There's not going to be an  
17 answer. It's multiple. There were -- there were so  
18 many complicated legs, there were analytical research  
19 that we did inside trying to understand from a  
20 reverse-engineering standpoint how the product was  
21 put together, so our analytical scientists would have  
22 been involved. I can give you lots of names of  
23 people. I guess there's no one person that -- except  
24 that is responsible for different work areas.

25 Q. Approximately how much money was spent over the

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1 years trying to reverse engineer Marlboro?

2 MS. FOX: Objection, asked and answered.

3 A. I don't really have a -- a -- a good estimate.

4 I think the reverse engineering was -- is -- is --

5 was a completed activity. Very difficult to give you

6 an answer. I'll give you a ballpark, but it will be

7 just almost -- almost a guess.

8 Q. Put us in that ballpark, sir.

9 MS. FOX: Objection, form.

10 A. I would, just very, very rough estimate, say

11 that the reverse-engineering activities at looking at

12 Marlboro domestically would have been two million

13 dollars plus.

14 Q. All right, sir. Well there were also other

15 funds that were expended on ammonia technology

16 research at Brown & Williamson; wasn't there?

17 A. Yes, because we were doing product development.

18 You just -- we just talked about reverse engineering,

19 which is just one aspect.

20 Q. I understand, and that's why I'm asking about

21 other aspects.

22 How much money was spent on product development

23 of a product that would be superior in impact to

24 Marlboro?

25 MS. FOX: Objection, asked and answered,

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1 and mischaracterizes.

2 A. Our efforts to produce a product that was  
3 superior to Marlboro in consumer terms, taste and  
4 flavor, overall satisfaction, impact, all those  
5 dimensions, not to characterize one dimension, so the  
6 consumers do select which they like best, period, it  
7 went over a lot of years and -- and undoubtedly was  
8 an ongoing, significant part of R&D, representing  
9 maybe a couple million dollars continually, if not --  
10 if not a lot more. It depends on what all I throw  
11 into the pot.

12 Q. All right, sir. Considering that you were  
13 vice-president of RD&E and then executive  
14 vice-president, all told what is your best estimate  
15 on the amount of money that was spent in reverse  
16 engineering Marlboro, in product development, in  
17 bench-lab testing, to put a product on the market  
18 that was superior to Marlboro?

19 MS. FOX: Objection, asked and answered.

20 And I don't think you're trying to be misleading, but  
21 there's a period of time between when he was  
22 vice-president of RD&E and when he was executive  
23 vice-president, and I don't know whether you're  
24 including that time in the question or not.

25 Q. The whole -- the whole time period that Brown &

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1 Williamson worked on these projects, approximately  
2 how much money did they spend?

3 MS. FOX: Objection, asked and answered.

4 Go ahead.

5 A. It is -- it is really very difficult to -- to  
6 give you an estimate because there were so many  
7 different products. You know there's -- there's one  
8 activity we talked about which -- I am trying to be  
9 helpful.

10 Q. I understand.

11 A. There's one activity we talked about, reverse  
12 engineering, there's product-development activities,  
13 but there's lots of different products. There's --  
14 there's a World-Wide BEST product that we're talking  
15 about, that we're also going back and looking at our  
16 other brands in our portfolio trying to improve some  
17 of those using some of the same learnings from that,  
18 we're doing process-development work, we have capital  
19 activities. You know, it's a significant expenditure  
20 in R&D activities and it went over a lot of years, so  
21 it's -- it's certainly in the tens of millions of  
22 dollars for all of what I described. But it's --

23 For me to pick out a component, they're so  
24 interrelated.

25 Q. That's fair enough. And that, I guess, is where

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1 I'm going, is over the years all of these activities,  
2 would it be more than 50 million dollars?

3 MS. FOX: Objection, form.

4 Q. Your best estimate?

5 MS. FOX: Objection, form,  
6 mischaracterizes, asked and answered.

7 A. I gave you my -- my best answer a moment ago.

8 Q. You said tens of millions of dollars, and I'm  
9 trying to figure out are you talking two tens of  
10 millions of dollars or a hundred tens of millions of  
11 dollars?

12 MS. FOX: Objection, form, calling for  
13 speculation now.

14 A. I'll make it very precise this time. I don't  
15 have a good estimate. My best estimate is 10 million  
16 dollars order of magnitude, which means it wasn't a  
17 hundred and it wasn't one.

18 Q. Now sir, turning your attention back to Exhibit  
19 333, Mr. McMurtrie --

20 MS. FOX: 332 you mean, or do I have the  
21 wrong number written down? I apologize if I do.

22 THE WITNESS: 333 on this.

23 MS. FOX: Okay. Go ahead.

24 Q. Sir, the exhibit is marked 333; isn't it?

25 A. Yes.

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1 Q. Sir, turning your attention back to Exhibit 333,  
2 Mr. McMurtrie talked about apparently they used  
3 increased pH to produce desirable reactions; right?

4 A. Who -- who are you referring to?

5 Q. The first page of the document, sir. Doesn't it  
6 say there, "They apparently use increased pH to  
7 produce desirable reactions...?"

8 A. Yes, that's -- that's what it says.

9 Q. All right. And do you understand the "they" to  
10 be referring to Philip Morris here?

11 MS. FOX: Objection, foundation.

12 A. I'm looking very quickly. I don't see any  
13 reference to -- to any competitive products. There  
14 are more than one competitor that could be, you know,  
15 looked at. You can make guesses. There's no need  
16 for me to do it.

17 Q. Okay. But -- fair enough.

18 But this is the period of time during which you  
19 were reverse engineering Marlboro; right?

20 MS. FOX: Objection, form.

21 A. In -- in 1984 I think we have analytical work  
22 going on and -- to understand the -- the Marlboro  
23 product.

24 Q. Mr. McMurtrie was involved in that work; right?

25 A. Drew, being a product developer, undoubtedly was

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1 involved in some of the product development work, but  
2 I -- as I said, I wouldn't characterize him as being  
3 the reverse engineering. But he's involved with --  
4 Q. Okay.

5 A. -- the overall program, yes.

6 Q. All right. And he goes on to say, "While this  
7 study simply elevated the smoke pH & increased free  
8 nicotine," then there's a period; right?

9 A. Yes.

10 MS. FOX: Well --

11 Q. And then it's not a complete sentence, though;  
12 is it, sir?

13 A. I mean the -- the complete sentence reads, "They  
14 apparently increased -- They apparently use increased  
15 pH to produce desirable reactions while this study  
16 simply elevated the smoke pH & increased free  
17 nicotine," period.

18 Q. Thank you, sir. My apologies because I'm not  
19 feeling too terrific.

20 Now if you go on to page 199, attached to Mr.  
21 McMurtrie's handwritten note there is a file note  
22 entitled "EFFECTS OF VARYING SMOKE PH ON RALEIGH  
23 KINGS;" right?

24 A. Yes.

25 Q. You received a copy of this document; didn't

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1 you, sir?

2 A. Shows I did.

3 Q. All right. And in this particular study or  
4 sampling that was done, ammonia-treated nicotine was  
5 put into cigarettes which were then smoked by Dupont  
6 smoke panelists; right?

7 A. I'll have to refer to the document to see if --

8 I was looking very quickly to see if I saw some  
9 Dupont reports.

10 Q. Fourth paragraph.

11 A. I see the -- I see the reference now. Thank you  
12 for the help.

13 Yes, these were apparently some experimental  
14 samples, obviously very early at this stage, that  
15 were sent to Dupont.

16 Q. And the panelists -- strike that.

17 Dupont is a facility that was located on Dupont  
18 Circle in Louisville?

19 A. For a lot of years, yes.

20 Q. And that was a facility at which various  
21 cigarettes which were in the development phase or  
22 experimental phases were smoked and then evaluated.

23 A. Among other things, that's correct.

24 Q. And so when it refers to "Dupont panelists,"  
25 those are smokers who are brought in off the street,

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1 the average smoker person, who then smokes a  
2 cigarette and evaluates it; right?

3 A. It's -- it's a testing facility, as you said,  
4 that uses smokers. They could be selected or -- or  
5 average or random.

6 Q. All right. But these Dupont panelists felt that  
7 the impact and the amount of tobacco taste increased  
8 as smoke pH increased; correct?

9 A. I'm going to read the rest of it because I never  
10 find things so straightforward.

11 Yes, that's -- that's what it says.

12 Q. And sir, one of the reasons that Brown &  
13 Williamson was looking at ammoniated technology for  
14 its cigarettes was because it wanted to -- strike  
15 that.

16 One of the reasons that Brown & Williamson  
17 reverse engineered Marlboro was because Marlboro  
18 sales were going up and Brown & Williamson's sales  
19 were going down; right?

20 A. I wouldn't characterize it like that, but I  
21 would say that we reverse engineered the -- the  
22 product because it -- one, it is, as you say, a -- a  
23 very good brand with -- and enjoying a lot of growth  
24 in -- in the U.S. at that time, but we also thought  
25 it was a very good product and -- and we had very few

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1 brands in the nonmenthol category. Our big -- our  
2 big brand was in the menthol.

3 Q. Sir, it was stealing smokers from Brown &  
4 Williamson product lines; wasn't it?

5 MS. FOX: Objection, form.

6 A. I mean, I would never characterize --

7 "Stealing" sounds like something illegal. I  
8 don't think Philip Morris was doing anything  
9 illegal. They were gaining market share,  
10 particularly in the nonmenthol segment.

11 Q. Okay. Well let me rephrase it a little bit  
12 better and see if I can make it more palatable to  
13 you.

14 There is something known as switchers in the  
15 tobacco industry; isn't there?

16 A. I've seen market-research information  
17 characterizing some segments as switchers, yes.

18 Q. And switchers are people who change from one  
19 brand to the other; right?

20 A. Yes.

21 Q. And Marlboro was getting more than its fair  
22 share of switchers as far as Brown & Williamson was  
23 concerned; isn't that true?

24 A. Not wanting to be cute at all, I -- I can say  
25 clearly that that brand was growing. Whether it was

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1 getting from -- inflow from switchers or new smokers  
2 or whatever, but that brand was going -- I don't have  
3 the statistics of how the switching dynamics/quitting  
4 dynamics are for the brand. It's available though.

5 Q. And one of the ways that cigarette companies get  
6 new smokers is to appeal to starter smokers; right?

7 MS. FOX: Objection, assumes facts and  
8 mischaracterizes.

9 A. I think what we do in terms of brand management,  
10 I'm not the expert, but we put together a -- a good  
11 product, try to develop a good package, good  
12 imagery. It's -- it's targeted to mature smokers.  
13 And there's a lot of laws and regulations that guide  
14 that. And -- and -- you know, and -- and how people  
15 come into the brand, I -- I don't know. But I think  
16 it's primarily targeted at switchers. Obviously  
17 people that choose to smoke have to pick a brand.

18 Q. But one of the reasons you reverse engineered  
19 Marlboro and engaged in ammonia technology was that  
20 it was of extreme commercial importance to Brown &  
21 Williamson; wasn't it?

22 A. The -- the reverse engineering of Marlboro was  
23 to -- to see if there was anything we could learn  
24 quicker from looking at their product, because we  
25 thought it was good, than just to continue to do

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1 development activities on our own. The Japanese do  
2 it all the time. We -- we did learn some I think  
3 important lessons in looking at a very well designed  
4 product and used elements of it. Not just ammonia  
5 technology, but it was important, but a lot of other  
6 features as well that we -- we felt were very well  
7 managed in product terms.

8 Q. But sir, my -- my question has to do with  
9 commercial importance. Isn't it true that one of the  
10 reasons that Brown & Williamson engaged in this  
11 nicotine -- I'm sorry -- ammonia technology was  
12 because it was of extreme commercial importance to --  
13 to the company?

14 MS. FOX: Asked and answered.

15 A. I -- I don't -- I don't agree with -- with  
16 that. What was important was improving our products  
17 and coming up with new initiatives, new products.  
18 Certainly how we -- we market is -- is probably  
19 paramount. Ammonia technology is one of the very  
20 important tools, there's no question. It produces  
21 good flavor, and -- and we -- we used it in some of  
22 our products. Not all. And that's -- I -- I think  
23 that makes it a -- a valuable tool and a valuable  
24 tool in product development.

25 (Plaintiffs' Exhibit 334 was marked

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1 for identification.)

2 BY MS. WIVELL:

3 Q. Sir, showing you what's been marked as Exhibit  
4 334, this is a document dated December 4th, 1984  
5 addressed to D. A. Martin; correct?

6 MS. FOX: No.

7 Q. Matkin, M-a-t-k-i-n. Right?

8 A. Yes, appears to be.

9 Q. And it's Bates numbered 512104912; right?

10 A. Yes.

11 Q. This is a document that you're shown as  
12 receiving a copy of, sir.

13 A. Yes.

14 Q. You received this in the ordinary course of  
15 business at Brown & Williamson; didn't you?

16 A. I assume so. I don't recall it yet.

17 Q. All right. Well who was Robert Johnson?

18 A. He was one of our very, very senior just  
19 researchers, so he was a very good chemist.

20 Q. And you -- why don't we -- you take a moment and  
21 read the document.

22 A. Okay.

23 MS. WIVELL: Can we go off the record? I  
24 have to ask the court reporter a question.

25 THE REPORTER: Off the record, please.

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1 (Discussion off the record.)

2 BY MS. WIVELL:

3 Q. Sir, you've had the opportunity while we were

4 off the record to look at Exhibit 334; right?

5 A. Yes.

6 Q. This is a -- a letter that you did receive at or

7 around the time it was written; correct?

8 A. I assume so. I was shown as a copy holder.

9 Yes.

10 Q. All right. And it was then kept in Brown &

11 Williamson's files; right?

12 A. I assume so.

13 Q. All right. And Robert Johnson, he was a person

14 who wrote about things that he knew about; right?

15 MS. FOX: Objection, form.

16 A. Most of the time.

17 Q. All right.

18 A. He was definitely a good chemist.

19 Q. All right. This is a Brown & Williamson --

20 strike that.

21 You received this in the ordinary course of your

22 business at Brown & Williamson; didn't you, sir?

23 MS. FOX: Asked and answered, I think.

24 A. I did say I probably would have gotten it.

25 Q. I'm sorry. It -- I --

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1           If I am repeating myself, please understand it's  
2 because I am not feeling good.

3 A.   Go ahead. I did answer it.

4 Q.   My apologies.

5           This letter repeats the experience that Mr.  
6 Johnson had had that -- of a meeting he had with a  
7 scientist from Imperial; right?

8 A.   He --

9           MS. FOX: Objection, form.

10 A.   "About the time Imperial and B.A.T. became  
11 competitors, I attended a TCRC meeting," and he spent  
12 some time --

13       Yes. So he talked with someone from Imperial.

14 Q.   All right. To what company is the reference to  
15 Imperial made?

16 A.   I may be --

17       I'm not a hundred percent sure. I don't want to  
18 mischaracterize. I would not normally have thought  
19 this, but since it says "became competitors," it  
20 might be Imperial of -- of United Kingdom.

21 Q.   All right. Now whoever this --

22 A.   But -- but I'm not sure. Okay?

23 Q.   Fair enough.

24       Whoever this person was, he was a tobacco  
25 company scientist; right?

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1 MS. FOX: Objection, assumes facts, and  
2 foundation.

3 A. I mean I -- I obviously don't know anything  
4 that's not in this note, and all it says is that --  
5 regarding what Bob wrote, I don't know anything else,  
6 is it says he met -- spent some time talking with an  
7 Imperial attendee.

8 Q. And this was at a tobacco -- tobacco industry  
9 conference; right?

10 MS. FOX: Objection, foundation.

11 A. It says a TCRC meeting.

12 Q. What does "TCRC" stand for?

13 A. "TCRC." I'm not sure. I think it's a tobacco  
14 chemists meeting, but I'm not -- I'm not sure.

15 Q. And in this letter Dr. Johnson relates some of  
16 the things he was told by that Imperial attendee at  
17 that conference; right?

18 MS. FOX: Objection, foundation.

19 A. I apologize. Could you read that question  
20 again?

21 Q. Sure.

22 In this letter Dr. Johnson sets forth some of  
23 the information he gleaned from his conversation with  
24 this person employed by Imperial.

25 MS. FOX: Objection, foundation.

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1 A. It appears that he's reporting on a discussion  
2 regarding pectin and nicotine complex.

3 Q. All right. And freeing up nicotine; right?

4 A. I don't --

5 MS. FOX: Objection, form.

6 A. -- think that's what it says. I'm -- the --

7 There's not much information here. There is a  
8 patent, so someone could go look at the patent and  
9 find details. But it looks like they were doing some  
10 nicotine fortification, which I would interpret --  
11 and -- and again I shouldn't be interpreting -- is  
12 not -- is not about release.

13 Q. Well they were talking about adding nicotine  
14 salt; right?

15 MS. FOX: Objection, foundation.

16 A. It -- it looks like they're talking about  
17 nicotine fortification, and what -- what forms I  
18 don't know.

19 Q. Well sir, don't you see a reference to "they  
20 could not find any nicotine salt that could be added  
21 to the tobacco," and then it goes on from there?

22 MS. FOX: Objection, form.

23 A. I -- I -- I do see that they said -- where they  
24 said they couldn't -- they could not find any  
25 nicotine salt that could be added to the tobacco. I

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1 see that reference.

2 Q. All right. And Dr. Johnson also relates  
3 information about nicotine scavenging; correct?

4 A. Yes, he does make a reference on nicotine  
5 scavenging.

6 Q. And he's talking about nicotine scavenging and  
7 pectin; right?

8 MS. FOX: Foundation objection.

9 A. I'm -- I did see that. I mean there's --  
10 there's a lot of speculation here; he's wondering  
11 about nicotine salts. I -- I know he's going to be  
12 accurate about some of the nicotine scavenging  
13 because it -- it -- it's certainly something that we  
14 have had measured in some of these recons.

15 Q. All right. I guess my point is, he -- he's  
16 giving a lot of information here and he concludes  
17 with the statement that "Anything we learn about this  
18 binding is of extreme commercial importance;" right?

19 A. I -- I read that earlier. I -- I think  
20 that's -- that was obviously his point of view. I  
21 don't -- I don't know of anything that has come to  
22 pass that's -- that supports that.

23 Q. Well isn't that one of the reasons -- strike  
24 that. Sir, do you have in front of you -- I'm  
25 sorry. Never mind.

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1 Sir, part of the ammonia technology work that  
2 was done in the '80s and into the '90s was done to  
3 try and increase the amount of free nicotine in  
4 cigarette smoke; isn't that true?

5 A. I'm not aware of that ever being an objective  
6 in -- in terms of trying to get a commercial  
7 product. What I am aware of, that as part of the --  
8 the one activity, which was just to match a -- a  
9 Marlboro product, that some of the earlier prototypes  
10 didn't do that. And there was a lot of discussion  
11 about nicotine transfer. There was also a lot of  
12 misunderstandings at -- at that stage, and --

13 But at any rate, the objectives that I'd given  
14 them was to match Marlboro. And even though we made  
15 some very, very good products, that match wasn't  
16 there. And nicotine transfer was one of the  
17 dimensions that our product was different in. So we  
18 were really trying to match up in everything, in tar  
19 deliveries and nicotine transfers, in taste, burn  
20 rates, you know, really try to make the same product,  
21 and then separately to try to make a superior  
22 product.

23 Q. And sir, isn't it true that you devoted millions  
24 of dollars to the subject of trying to determine how  
25 to free up more nicotine so that it would have a

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1 greater impact in smoking?

2 MS. FOX: Objection, asked and answered.

3 A. That's just not the case. We -- we did spend a  
4 great deal of money, and I've described it so I won't  
5 again, trying to make a superior product, and it was  
6 about consumer acceptability of the product.

7 (Plaintiffs' Exhibit 335 was marked  
8 for identification.)

9 BY MS. WIVELL:

10 Q. Sir, showing you what's been marked as  
11 Plaintiffs' Exhibit 335, this is a document which you  
12 received that is dated September 23rd, 1985; right?

13 A. Yes.

14 Q. And for the record it's Bates number 620388455;  
15 right?

16 A. Yes.

17 Q. And this concerns -- or the title of it is "pH  
18 EFFECTS DURING AMMONIA PROCESSING;" right?

19 A. Yes, it is.

20 Q. Now this document talks about experiments which  
21 were conducted at Brown & Williamson during this  
22 process of trying to produce a product that has the  
23 same qualities as Marlboro; right?

24 A. I think that was all -- this is all part of that  
25 work.

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1 Q. All right. And these experiments showed that  
2 having an alkaline pH environment doing -- during  
3 ammonia/reducing sugar reactions increased the  
4 quality -- I'm sorry, quantity of reaction products  
5 formed; right?

6 A. Yes.

7 Q. What are reaction products?

8 A. These are the flavors that I've been talking  
9 about earlier. These are the Brownian reactions that  
10 take place with amino acids and sugars. That's what  
11 makes food, when you cook them and brown them, like  
12 bakery goods, have flavors.

13 Q. But sir, quite a portion of this document is  
14 devoted to a discussion of free ammonia; right? Or  
15 free nicotine.

16 A. I'll have to read it if you want me to see what  
17 else it covers.

18 Q. Well why don't you turn to page two. There do  
19 you see a table that talks about product properties  
20 that includes free nicotine?

21 A. Yes, I -- I see that. And this -- this is an  
22 example of what I've talked about earlier. And  
23 unfortunately, this is still our scientists producing  
24 this. This is -- this says free -- free nicotine,  
25 but it is -- and you can get your own specialists

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1 to -- to confirm what I'm about to say, it says purge  
2 and trap, which is not a method to -- to measure free  
3 nicotine in the sense that people talk about in  
4 pharmacokinetics. This is about putting the sheets  
5 to a -- into a container and sucking off until they  
6 can get as much nicotine out as possible, and you can  
7 get a lot out. That's not that free nicotine people  
8 talk about in pharmacokinetics and smoke, which is a  
9 very, very small proportion. And our documents  
10 are -- are littered with this confusion,  
11 unfortunately.

12 Q. Move to strike as non-responsive.

13 Sir, my question is: On page two, is there a  
14 table that talks about product properties that  
15 includes free nicotine?

16 MS. FOX: Objection, asked and answered,  
17 and misleading.

18 A. There is a table regarding a number of different  
19 properties, and it has a -- a line on free nicotine  
20 and purge and trap, which is -- if you want to have  
21 an understanding, it would -- it is not referring to  
22 free nicotine that you might think references back to  
23 some of our previous discussions. It's a totally  
24 different method, and it's not giving you the same  
25 results.

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1 Q. Move to strike as non-responsive.

2 Sir, I'm not focusing on method, I'm asking you  
3 simply: Isn't it true on page two that there is a  
4 table that talks about free nicotine under "PRODUCT  
5 PROPERTIES?"

6 MS. FOX: Objection, asked and answered.  
7 The witness has identified what it says on the  
8 table. And misleading.

9 A. I -- I will identify what this means if you  
10 like.

11 Q. Sir, why don't you answer my question. If you'd  
12 answer my question we could go on.

13 A. But it would be a misleading answer if I --  
14 I'm giving -- I'll try to give you the minimum I  
15 think I can to really --

16 Q. Sir, misleading that there is a table on page  
17 two that says what it says?

18 A. No.

19 MS. FOX: Objection.

20 A. It's --

21 MS. FOX: Objection, argumentative. The  
22 table says what it says, and the witness has read  
23 what it says, "Free Nicotine, paren, P&T Counts,  
24 close paren." I think it's only fair that you read  
25 the table accurately for the witness.

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1 Q. Sir, let me ask my question again.

2 Isn't it true that on page two there is a table  
3 that under "PRODUCT PROPERTIES" says "Free  
4 Nicotine?"

5 MS. FOX: Objection, asked and answered,  
6 misleading.

7 A. There is a table that says "Free Nicotine" by  
8 the purge and trap method, and that is a totally  
9 different -- it's a totally different method that  
10 does not describe the amount of free nicotine that's  
11 thought of in a pharmacological sense.

12 Q. Move to strike as non-responsive.

13 Now sir, isn't it a fact that one of the things  
14 that these experiments were looking at was the  
15 ability to convert from a free -- I'm sorry -- from a  
16 bound to a free state, convert nicotine?

17 MS. FOX: Objection, mischaracterizes.

18 A. There was a --

19 The whole thrust of this is using ammonia  
20 technology to produce flavors. There's also  
21 recognized there is some effect on pH. There is a  
22 lot of hypotheses in terms of the pH effects on the  
23 smoking properties, and there's discussions about  
24 free and bound as it relates to those pH changes.

25 Q. Sir, and you were looking at whether you,

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1 meaning Brown & Williamson, could convert bound  
2 nicotine to free nicotine so that it would give a  
3 greater impact to the smoker; isn't that right?

4 MS. FOX: Objection, mischaracterizes.

5 A. No, it's -- it's not right. We were --

6 We did look at free versus bound nicotine, many  
7 times incorrectly labeled and perhaps even poorly  
8 understood at times, but the effort was never really  
9 to produce more nicotine, the objective was to  
10 produce a superior smoking product. It was clearly  
11 the objective. And that -- I think that -- that  
12 answers the question.

13 Q. Sir, would you turn to Exhibit 190. That's it.

14 That's a document you issued; right?

15 A. Yes.

16 MS. FOX: I'm sorry, do I have a copy --

17 Can I have a copy of this one? I think this is  
18 the one that you --

19 MS. WIVELL: This has been previously  
20 marked, and I don't have a copy of this particular  
21 document, and you objected to my marking what appears  
22 to be a complete copy of this document.

23 MS. FOX: Well I -- I think even for the  
24 previously marked documents it's only fair, and you  
25 have in the past provided copies of that, that you

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1 provide a copy of this one.

2 I'll take his if that's -- that's what I want.

3 (Document handed to Ms. Fox by Mr. Plasse.)

4 BY MS. WIVELL:

5 Q. Sir, Exhibit 190 is a document you issued in

6 October -- October 26, 1992; right?

7 A. Yes.

8 Q. And the subject is "PM's GLOBAL STRATEGY:

9 MARLBORO PRODUCT TECHNOLOGY;" right?

10 A. Yes.

11 Q. And you set forth in this document the key

12 desirable characteristics of a Marlboro cigarette

13 that you were trying to emulate at Brown &

14 Williamson; right?

15 A. I haven't looked at this document yet.

16 Q. Well sir, you put the document together.

17 A. I didn't.

18 Q. It was issued by you; correct?

19 A. This is correct, and only because the

20 department --

21 I'm not walking away from any responsibility at

22 all, I'm just saying I didn't put the document

23 together.

24 Q. All right.

25 A. R&D reported to me, and they put it issued by

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1 me.

2 Q. Sir, isn't it true that this document lists the  
3 key desirable characteristics that Brown & Williamson  
4 had identified in Marlboro cigarettes?

5 A. I haven't reviewed the document, but I'd be  
6 happy to.

7 Q. You haven't reviewed this document in  
8 preparation for your deposition, sir?

9 A. I may have, but right now it doesn't look  
10 familiar.

11 Q. All right. Would you turn to the page whose  
12 Bates number ends 109. Do you have it there?

13 A. Yes.

14 Q. Do you see at the bottom of the page, "Ammonia  
15 technology is critical to the Marlboro taste" -- I'm  
16 sorry, "character, taste, and delivery. Key  
17 desirables are," and then there's a list of key  
18 desirable characteristics; is that right?

19 A. Yes, I see this.

20 Q. And the fourth key desirable characteristic is,  
21 quote, "Free nicotine/nicotine transfer;" isn't that  
22 right, sir?

23 A. This -- this does say a whole list of things.  
24 It says, "Ammonia technology is critical to the  
25 Marlboro character, taste, and delivery." You

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1 started to read that, and a lot of other things.

2       These are all hypotheses, and some of them are  
3 right, some of them are wrong. And yes, it does say  
4 "Free nicotine/nicotine transfer."

5       At the end of the day, and you'll see, our  
6 products don't change in terms of pH, so we -- we see  
7 some things that are wrong here.

8 Q. All right.

9 A. But this was -- this was someone's best  
10 hypothesis of the important ammonia technology  
11 characteristics in 1992, clearly.

12 Q. Someone's best hypothesis. Sir, this is the  
13 culmination of years of work at Brown & Williamson by  
14 Brown & Williamson's best scientists; isn't that  
15 true?

16           MS. FOX: Objection, argumentative, assumes  
17 facts.

18 A. This is --

19       There is a lot of work to get up to this point  
20 and there's a tremendous amount of understanding  
21 behind a lot of these characters. The ammonia in  
22 smoke, there's a clear understanding at this stage in  
23 terms of the -- the smoke chemistry and flavors.  
24 There's -- there's some level of understanding of  
25 this reduction in gas-phase carbonyls in combination

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1 with ammonia. There is still a -- unfortunately, a  
2 fair amount of misunderstanding in terms of nicotine  
3 even at this stage. We have even methods that are  
4 being purported as free nicotine which aren't free  
5 nicotine at all. There is also a continuing debate  
6 over nicotine transfer, and again, depending on how  
7 it's defined, looks important or not -- sorry. That  
8 wasn't very -- I don't know what I even meant by it  
9 "looks important or not."

10 The nicotine transfer would either show effect  
11 or not depending on how people calculated the impacts  
12 of other factors. So there was a tremendous amount  
13 of understanding. These are the best --

14 I'm sorry. Do you -- do you want me to finish  
15 my answer?

16 Q. No, sir, I'm listening. Are you done?

17 A. No. But -- but I'll -- I'll stop at that point  
18 and just say briefly: This was a -- the best  
19 understanding at that stage. Some of these things  
20 are still not totally understood, some are -- are not  
21 accurate, ultimately, several years later.

22 Q. Move to strike as non-responsive.

23 Sir, my question is this: You said this was  
24 someone's best hypothesis. This was a document which  
25 summarized more than a decade's worth of work by

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1 Brown & Williamson's key scientists; right?

2 MS. FOX: Objection, asked and answered.

3 A. I -- I believe I said we started a very  
4 significant activity in 1983. I -- I believe I  
5 characterized it, as best I can recall, three or four  
6 years of intensive look at the reverse engineering  
7 and undoubtedly some after that. There was a lot of  
8 product development after that. So I think that's a  
9 fair characterization of what -- what is -- is going  
10 into this.

11 Q. Sir, and based on the information you learned at  
12 Brown & Williamson as executive vice-president of  
13 RD&E, you brought together the scientists from all of  
14 the BAT Group countries for an ammonia technology  
15 conference that occurred in Louisville, Kentucky, to  
16 talk about all of the things you'd learned about  
17 ammonia technology. Isn't that true?

18 A. I think that -- that we did have an ammonia  
19 conference, yes.

20 Q. And this what you referred to as hypothesis was  
21 discussed at length by all of these scientists from  
22 around the world, from BAT Group companies during  
23 that technology conference; weren't -- wasn't that --  
24 strike that.

25 And what you referred to as this hypothesis was

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1 discussed at length by all of these scientists when  
2 they came to this ammonia technology conference;  
3 right?

4 A. At the moment I'm not sure I have any hypothesis  
5 on the record. I think you've stricken everything  
6 I've said.

7 Q. Well sir, you referred to Exhibit 190 as a  
8 hypothesis; isn't that right?

9 A. No, I have not.

10 Q. Okay. Just so we're clear, what is referred to  
11 on page 109 of Exhibit 190 is not a hypothesis, it's  
12 fact; isn't it?

13 MS. FOX: Objection, mischaracterizes, and  
14 misleading.

15 A. This exhibit on 109 is -- is --

16 Well what it says, it says, "Key factors for  
17 each of these technology areas are summarized below,"  
18 and it's based on a fairly significant understanding  
19 that we've talked about in terms of work and it  
20 represents a -- at that point the most knowledgeable  
21 perspective that at that point had been developed in  
22 terms of the key characteristics of Marlboro.

23 Q. And based on what you knew in 1989 about ammonia  
24 technology, you brought a group of scientists from  
25 throughout the world together in Louisville,

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1 Kentucky, to talk about ammonia technology; didn't  
2 you, sir?

3 A. I didn't personally do that. There was an  
4 ammonia conference, and I believe I was involved  
5 with -- with it myself, but I'm not a hundred percent  
6 sure.

7 Q. You received --

8 A. And we --

9 Q. Go ahead.

10 MS. FOX: Go ahead, finish your answer, Mr.  
11 Kohnhorst.

12 A. We did review the ammonia technology in terms of  
13 the current status with people that were working with  
14 us on collaborative efforts.

15 Q. Can you get out Exhibit 183, please.

16 MS. FOX: Do you have another copy?

17 MS. WIVELL: I don't. Can you share with  
18 the witness?

19 MS. FOX: Well I'll be in the video camera  
20 if I share with the witness. That's the concern.  
21 I'm sorry, I need to look at a copy while he's  
22 looking at it.

23 MS. WIVELL: All right.

24 MS. FOX: If we could take a couple of  
25 minutes while I get a copy.

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1 MS. WIVELL: Fair enough. Let's go off the  
2 record.

3 THE REPORTER: Off the record.

4 (Discussion off the record.)

5 MS. WIVELL: I would -- I would like to  
6 note for the record that earlier in the deposition,  
7 while we were off the record, I noted that what was  
8 marked as Deposition Exhibit 190 in the Reynolds  
9 deposition is actually an incomplete exhibit, and  
10 that the Bates number of the document apparently goes  
11 up to 0000294. I offered to mark a complete copy of  
12 the document at this time and give one to defense  
13 counsel, but they objected because the complete  
14 document was not on the predesignation list, and so  
15 we used the incomplete document, knowing at the time  
16 it was incomplete.

17 MS. FOX: Well --

18 MS. WIVELL: I just wanted the record to  
19 reflect that.

20 MS. FOX: I object. The reason that I had  
21 indicated it was incomplete is because the copy that  
22 the court reporter had pulled out as Exhibit 190 was  
23 considerably shorter than the copy that you were  
24 holding. You're now making a different  
25 representation, which is that a larger Bates span had

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1 been designated in the copy that the court reporter  
2 has.

3 MS. WIVELL: No, I'm not saying that a  
4 larger one was designated. I designated all  
5 documents previously marked. I just want the record  
6 to accurately reflect that when you made -- when you  
7 noticed that the court reporter's was smaller, we  
8 discovered that the document apparently that was used  
9 and marked as Exhibit 90 was not complete, and I want  
10 the record to reflect that I have a complete copy of  
11 the document and I wanted to mark it, but I did not  
12 do so because of your objection.

13 THE REPORTER: It was Exhibit 190.

14 MS. WIVELL: 190. I'm sorry. And the  
15 record should also reflect I have food poisoning and  
16 don't feel well and have been trying to get done.

17 BY MS. WIVELL:

18 Q. Sir, you have before you what's been marked as  
19 Exhibit 183; correct?

20 A. I do, yes.

21 Q. Those are the ammonia technology conference  
22 minutes from the -- the conference that was held in  
23 Louisville in May of 1989; right?

24 A. Yes, it appears so.

25 Q. Now --

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1 A. And -- and if I could just add, while I've  
2 attended some conferences, and I thought perhaps I  
3 went to this one, I'm not shown as a --

4 I'm sorry. Actually I thought this was  
5 attending. It's just distribution.

6 Q. There is a list of -- of distributees and it  
7 shows that you received a copy of this document;  
8 right?

9 A. That's correct.

10 Q. The list of participants is actually on the page  
11 that ends with Bates number 15.

12 A. That's correct. And that I guess is what I'm  
13 looking at.

14 I did not attend according to this list.

15 Q. But you did get a copy of the minutes.

16 A. I did.

17 Q. Now this is the first of two ammonia technology  
18 conferences that were held at Brown & Williamson to  
19 discuss what Brown & Williamson had learned with  
20 ammonia technology and Marlboro cigarettes; right?

21 A. Yes, I think that's generally right. The  
22 objective of this conference, and it's very brief  
23 here, is to share information about the importance,  
24 determine opportunities for applications, to fill  
25 research gaps, which -- which is a key issue because

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1 there's tremendous yet to be determined, and discuss  
2 areas for our future research or collaborative  
3 research.

4 Q. You're reading from the executive summary;  
5 aren't you?

6 A. Yes. And I didn't read it detail by detail, I  
7 mean I didn't read it completely.

8 Q. All right. Would you turn to the next page of  
9 the summary of the program and discussion.

10 A. Yes.

11 Q. Do you see there that there is reference to Dr.  
12 Chakraborty presenting a paper on ammonia disposition  
13 in Marlboro?

14 A. I see.

15 Q. And if you look down, there are several bullet  
16 points including "Improved nicotine transfer;" right?

17 A. Among other things, I see that bullet.

18 Q. All right. Now a little bit later in that  
19 particular portion of the minutes, if you turn to  
20 page 020, you see a portion that talks about a  
21 discussion on ammonia effects; right?

22 A. In the middle of the page?

23 Q. Yes. 020.

24 A. Yes. I'm sorry, but where -- where are you  
25 directing me on this page?

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- 1 Q. I'm sorry. Toward the bottom of the page.
- 2 A. Yes.
- 3 Q. And you see it says there "Ammonia Effects -
- 4 Discussion?"
- 5 A. Yes.
- 6 Q. Now there under the first bullet point it notes
- 7 that while Brown & Williamson can mimic Marlboro's
- 8 taste properties, Brown & Williamson hadn't been able
- 9 to match Marlboro's impact; right?
- 10 A. Yes, I see that.
- 11 Q. All right. And was Brown & Williamson ever able
- 12 to match Marlboro's impact?
- 13 A. I really don't have the information right now to
- 14 answer that. I would -- I would think, yes. I'm a
- 15 little bit from recall, but one of the things in some
- 16 of our earlier -- as our technology was advanced, was
- 17 at one point the -- the -- the use of recons just
- 18 made the product too bland and not much -- and not as
- 19 much tobacco taste and probably at the same time not
- 20 as much impact, and I believe that there were
- 21 improvements made in all those dimensions and we
- 22 moved forward.
- 23 Q. But impact was something that you were trying
- 24 to -- to copy that Marlboro had; right?
- 25 A. Well I commented earlier we were -- I -- I had

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1 one area of work that was trying to match up  
2 everything, every consumer descriptor that they would  
3 in terms of the smoke quality.

4 Q. Now you were also aiming to look at nicotine  
5 transfer efficiency and match that; right?

6 A. Everything. I mean I didn't tell them to match  
7 this, this and this, and don't worry about this. I  
8 told them to design a product and match it up. So  
9 nicotine transfer, puff number, pressure drops, you  
10 know, I asked them to match it. It's not easy to do,  
11 mind you.

12 Q. Now sir, would you turn to page 027.

13 A. Yes.

14 Q. There is a graph that talks about ammonia  
15 disposition in Marlboro; right?

16 A. 027. A graph?

17 Q. Or I'm sorry, a chart --

18 A. Okay.

19 Q. -- that talks about ammonia disposition in  
20 Marlboro.

21 A. Yes, I see that at the top.

22 Q. Do you see where it refers to nicotine transfer  
23 efficiency in smoke?

24 A. Yes.

25 Q. Is there any way for a smoker to know how much

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1 nicotine he or she is actually receiving -- strike  
2 that.

3 Is there any way for a smoker to know what the  
4 nicotine transfer efficiency is of the cigarette he  
5 or she is smoking?

6 A. Only if they knew how to calculate --

7 If they knew the definition of what nicotine  
8 transfer efficiency was, and they had a little bit of  
9 way of calculating knowing how much tobacco is in the  
10 cigarette and reading -- reading the smoking machine  
11 deliveries and making assumption they smoke --

12 So I mean in pract -- in practical terms, no,  
13 they -- they really can't determine it very easily.  
14 Although they could take it to a lab and -- and do  
15 this. But I don't think they're very interested in  
16 it either.

17 Q. Well sir, the -- the cigarette package that we  
18 have, Exhibit 309, it doesn't have any figures that  
19 talk about nicotine transfer efficiency on it; does  
20 it?

21 A. It doesn't have about a hundred things that we  
22 could -- we use to describe the product. It doesn't  
23 say how it tastes, it doesn't say what our consumer  
24 information said about the quality of the product, it  
25 doesn't say how much weight is in the product. I

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1 mean there's -- there's so many descriptors. And no,  
2 it doesn't say anything about nicotine transfer  
3 efficiency. This is a -- a tool for experts trying  
4 to guide matching Marlboro.

5 Q. Move to strike as non-responsive.

6 Sir, my question is simply this: That pack of  
7 cigarettes, Exhibit 309, doesn't have any way for the  
8 average smoker to know how much the nicotine transfer  
9 efficiency is in the cigarette he or she is -- has  
10 smoked -- is smoking; right?

11 MS. FOX: Objection, asked and answered.

12 A. The -- the most important information for the  
13 consumer is -- has been, based on the judgment of the  
14 FTC, which is asking us to put information on the  
15 pack, is -- I'm sorry, actually I misspoke -- in our  
16 advertising is nicotine that is transferred in a  
17 normal smoking machine, and that information is  
18 available -- available to the smoker. If they read  
19 the advertisement or if they call Brown & Williamson,  
20 they will tell them.

21 Q. But sir, the -- the nicotine transfer efficiency  
22 is not what a smoking machine receives; is it?

23 A. Nicotine transfer efficiency is a calculated  
24 number.

25 Q. But it is not the number that is --

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1 A. I didn't --

2 Q. -- calculated by a cigarette smoking machine; is  
3 it, sir?

4 MS. FOX: Objection, asked and answered.  
5 And please don't interrupt the witness.

6 A. The nicotine transfer is not what is measured by  
7 smoking machine, but what is measured by smoking  
8 machine is the number that you use to calculate the  
9 nicotine transfer. And what's important to the  
10 smoker is not some calculation, but has been  
11 determined by the FTC what the product delivers under  
12 a, you know, standard smoking method. So --

13 Q. And so you would agree that what the smoker --  
14 what is delivered to the smoker is not what is the  
15 number that comes out of a smoking machine.

16 A. Well that comment comes from right out of the  
17 blue. We haven't been talking about that. If you're  
18 trying to link that to nicotine transfer efficiency,  
19 it's totally unrelated. But what the smoker gets, as  
20 we talked about earlier, and I think we had a long  
21 discussion about it, is depending on how they smoke  
22 compared to the conditions of the smoking machine.

23 Q. Fair enough. So you would agree, then, that the  
24 number that's on the cigarette pack that is the  
25 number that the smoking machine gets is totally

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1 unrelated to what the smoker actually gets when they  
2 inhale a cigarette.

3 MS. FOX: Objection, mischaracterizes.

4 A. I -- I really didn't say that. And I think I've  
5 been very clear as well. What I've said is if the  
6 smoker -- and we had a long discussion, I think the  
7 record's already very clear on this -- if the smoker  
8 smokes different than the smoking machine in a lot of  
9 different dimensions, and I don't need to go over  
10 them all, they will get a different tar delivery and  
11 a different nicotine delivery than the smoking  
12 machine.

13 It's just like gas mileage in a car. If you  
14 go -- if you drive hard, you'll get less than what  
15 they say; if you drive easier, maybe you'll get  
16 more.

17 MS. WIVELL: Why don't we stop for the  
18 evening.

19 THE REPORTER: Off the record, please.

20 (Discussion off the record.)

21 MS. FOX: I'd just like the record to  
22 reflect that prior to the lunch hour I provided you  
23 with copies of documents that I might use in direct  
24 examination -- redirect examination.

25 MS. WIVELL: Do I have them all?

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1 MS. FOX: I believe so.

2 MS. WIVELL: And they've all been --

3 MS. FOX: Although -- although I will tell  
4 you that the course of the questioning today may  
5 raise additional ones. I don't know whether it will  
6 or won't. And if you have objections, you can make  
7 them when you have the objections.

8 MS. WIVELL: Well I would appreciate  
9 receiving copies bright and early first thing in the  
10 morning of any additional document you intend to  
11 use. I also would like to know that -- I would like  
12 you to represent to me that all of these documents  
13 that you gave me have been produced in the Minnesota  
14 depository.

15 MS. FOX: I believe that they have. I mean  
16 we can certainly confirm that, but I believe that  
17 they have.

18 MS. WIVELL: Would you do that and report  
19 back? I'm sorry.

20 MS. FOX: I'll -- I'll try to find out.

21 MS. WIVELL: Thank you.

22 THE REPORTER: Off the record, please.

23 (Deposition recessed at 5:32 o'clock p.m.)

24

25

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1 C E R T I F I C A T E

2 I, Richard G. Stirewalt, hereby certify  
3 that I am qualified as a verbatim shorthand reporter;  
4 that I took in stenographic shorthand the testimony  
5 of EARL E. KOHNHORST at the time and place aforesaid;  
6 and that the foregoing transcript consisting of pages  
7 555 through 809 is a true and correct, full and  
8 complete transcription of said shorthand notes, to  
9 the best of my ability.

10 Dated at New York, New York, this 18th day  
11 of June, 1997.

12

13

14

15 RICHARD G. STIREWALT

16 Registered Professional Reporter

17 Notary Public

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19

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1 C E R T I F I C A T E

2 I, EARL E. KOHNHORST, the deponent, hereby  
3 certify that I have read the foregoing transcript  
4 consisting of pages 555 through 809, and that said  
5 transcript is a true and correct, full and complete  
6 transcription of my deposition except:

7

8

9

10

11

12

13

14

15 EARL E. KOHNHORST

16 Deponent

17

18 Sworn and subscribed to before me this day  
19 of , 1997.

20

21

22

23 Notary Public

24

25 My commission expires .

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